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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES Copyright Royalty Board
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

WRITTEN REBUTTAL STATEMENT OF
SOUNDEXCHANGE, INC.

Volume 2: Record Label Fact Witness Statements

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February 23, 2015

PUBLIC VERSION

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14-CRB-0001-WR (2016-2020)

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REBUTTAL TESTIMONY OF
DENNIS KOOKER
President, Global Digital Business and U.S. Sales,
Sony Music Entertainment

PUBLIC VERSION

Witness for SoundExchange, Inc.

REBUTTAL TESTIMONY OF DENNIS KOOKER**BACKGROUND AND OVERVIEW**

My name is Dennis Kooker. I am the President, Global Digital Business and U.S. Sales, for Sony Music Entertainment (“Sony Music”). I previously submitted written direct testimony, in which, among other things, I provided an overview of how the digital revolution has impacted the recorded music industry and the relevance of these market changes to digital licensing and the rates and terms for statutory webcasting.

I have reviewed the public redacted testimony of Simon Fleming-Wood. I understand that Mr. Fleming-Wood takes the position that Pandora does not compete in the market with on-demand services, but rather competes only with terrestrial and satellite radio. Mr. Fleming-Wood says that Pandora views itself as a *complement* to on-demand streaming. He says that Pandora is the “radio” and Spotify is the “record store.” (Fleming-Wood WDT at 6-8).

I have also reviewed the testimony of Bob Pittman. I understand that Mr. Pittman takes the position that iHeartMedia (“iHeart”) and other statutory webcasters should be seen as fundamentally different from on-demand and other directly licensed services. Mr. Pittman expresses the view that statutory webcasters, on the one hand, and on-demand services, on the other, “serve very different roles for both consumers and labels.” (Pittman WDT at 6).

I disagree. Mr. Fleming-Wood and Mr. Pittman offer these opinions to distinguish statutory services from the most obvious and appropriate marketplace benchmark—on-demand subscription services. Statutory and on-demand services can and often do substitute for one another. Statutory services and interactive services provide consumers with streaming experiences that are rapidly converging. This convergence has occurred at an increasing rate over the last rate period and undoubtedly will continue through the 2016-2020 term. Because the

consumer offerings are moving even closer to each other, our agreements with on-demand services are better benchmarks than ever to show what a willing buyer and willing seller would agree to in a market without a statutory license.

One notable difference between these types of services involves the commercial proposition for the consumer. Many statutory webcasters—relying on the low statutory rates (especially the rates paid by Pandora)—are free-to-the-consumer. On-demand subscription services, by contrast, generally require or encourage consumers to pay for the content they consume. Since the two current market offerings consist of fundamentally similar user experiences, cost is all the more likely to be a deciding factor for consumers. Moreover, because the functionality of statutory services so closely approximates that offered by the interactive services, consumers have little reason to pay for a subscription service. The head-to-head competition between services that offer similar functionality but have very different price points results in a downward pressure on rates in negotiations for direct licenses. The net impact to the recorded music industry, therefore, is that streaming generates a much smaller pool of total revenues to continue to incentivize the creation of music and pay those responsible—the artists and record labels who create and finance the music—for developing the sound recordings used across *all* streaming services.

Finally, I reviewed redacted versions of the written direct testimony of Profs. Carl Shapiro and Michael Katz. I understand that both argue that the market for interactive streaming licenses is not “workably competitive” or “effectively competitive.” I disagree with this proposition too. As I explain below, our negotiations with interactive streaming services involve substantial compromise.

CONVERGENCE

Statutory services compete directly with interactive and other directly licensed services. As a result, the proposed interactive benchmark agreements are the most appropriate and comparable marketplace evidence of the rates and terms for this proceeding.

I. Statutory Services (Including Simulcasters) Offer Functionality that Increasingly Approaches an On-Demand Listening Experience

Statutory and interactive services have been converging rapidly in the functionality they offer consumers. I discussed some of this convergence in my written direct testimony. Many consumers like the flexibility to “lean back” and have a programmed experience at some times, and to “lean forward” and select specific songs at other times. Statutory and interactive services have both made significant adjustments to their offerings to respond to this consumer preference. Statutory services have increased the number of personalization options available to users, moving those services closer to an on-demand listening experience. At the same time, interactive services like Spotify and Beats have added customized and programmed, radio-like streaming options to appeal to consumers when they want a lean back experience. To further illustrate this phenomenon, my testimony discusses some of the many examples of convergence between these types of services.

A. iHeartRadio

Convergence is not limited to customized or personalized streaming. In practice, simulcast streaming services operate in such a way as to closely resemble the experience of on-demand listening. This is particularly true for listening to popular tracks.

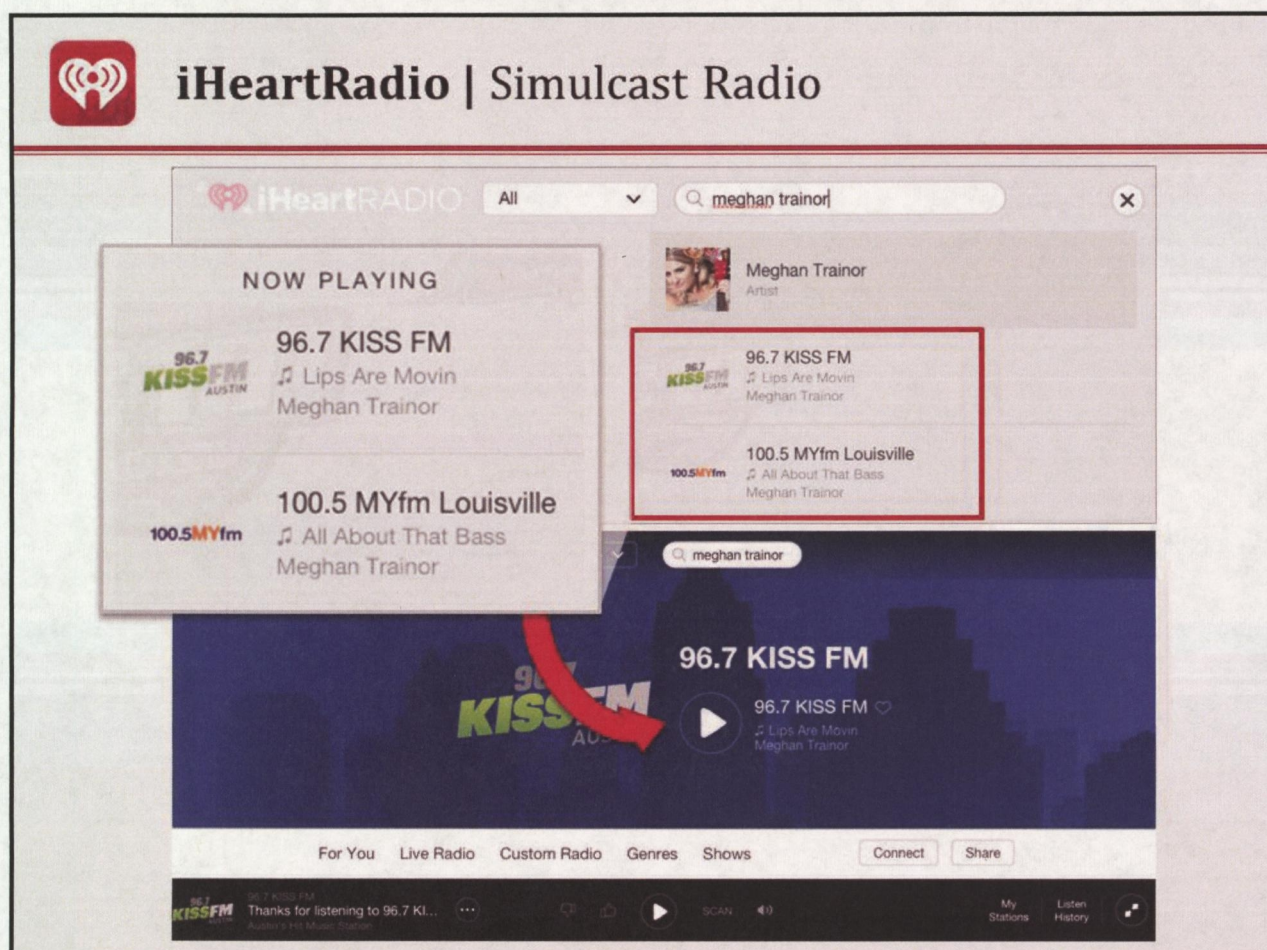
A user can search iHeart’s simulcast radio service by genre and/or geographic area, and all simulcast stations responsive to that search will appear to that user, along with the songs currently being played on those stations. The user can then immediately listen to that song. For

example, our team conducted a search for Top 40 & Pop stations in the United States. iHeartRadio simulcasts 220 stations¹ in this category (many more than the couple broadcast over-the-air in a local radio area). Of the 220 Top 40 & Pop stations, many identified that they were currently playing popular songs that the user could instantaneously access.

In addition, a user can use the general search function to search for an artist and iHeartRadio will show those simulcast stations currently playing that artist's music. As an example, our team conducted a search for Meghan Trainor, a Sony Music artist, and then recorded the results.² As shown below, iHeartRadio announced that Meghan Trainor's music was then playing on two simulcast stations: 96.7 KISS FM (Austin) and 100.5 MYfm (Louisville). It provided the user the option to pick between "All About that Bass" or "Lips Are Movin"—Meghan Trainor's two hit singles. This interface constantly refreshes to include new stations that are playing her songs as the song ends on other stations.

¹ The vast majority of these 220 stations appear to be simulcast transmissions of terrestrial radio broadcasts. It appears that a very small number are programmed stations (e.g. Michael Jackson and Friends). Even for these programmed stations, iHeartRadio provides the user with the ability to immediately know and access the song that is currently playing.

² We chose Meghan Trainor for these examples because she is an example of a currently popular artist in whom Sony Music has invested heavily (both in terms of time and money) and at substantial risk. I discussed this investment and risk in my direct testimony. Meghan has two current hit singles: "All About That Bass" and "Lips Are Movin." "Lips Are Movin" is No. 6 and "All About That Bass" is No. 12 on Billboard's February 14, 2015 Hot 100 chart. Meghan's album "Title" is No. 3 on Billboard's February 14, 2015 Billboard 200 chart.



The ability to search *all* (or a selected portion) of iHeartRadio's simulcast stations in a musical genre or a geographic region and immediately identify and access specific artists and/or songs being played, or alternatively, search for a specific artist and immediately access that artist's music from various simulcast stations, make iHeart's simulcast service fundamentally different from terrestrial radio. At my request, Sony Music staff pulled the play information for iHeart's own terrestrial radio stations in the two largest radio markets during the time period of the search described above (February 4-10, 2015).³ "All About That Bass" was played a total of six times in the 168-hour period on Z100 in New York, and was played only two times during

³ The airplay charts are attached as Exhibit 1.

the same time period on KIIS-FM in Los Angeles. A terrestrial radio listener would have to listen for hours (at least) to ensure that she would hear the song. By contrast, during the same time period, an iHeartRadio listener would be able to hear the song almost immediately.⁴ I understand that iHeart and the National Association of Broadcasters (“NAB”) contend that simulcasting is not comparable to or a substitute for on-demand streaming, but instead is just like terrestrial radio. As the above example illustrates, simulcasting services are competing with on-demand services by allowing users to search for currently playing artists and play specific tracks.⁵

iHeartRadio’s custom streaming also demonstrates the rapid pace of convergence with on-demand services. iHeart offers a very predictable and narrowly tailored listening experience that approximates on-demand functionality. A user can hear several songs from the artist that he or she requests within the first few plays on a custom “station.” As a result, the user is very likely to hear the *exact* song or songs he or she had in mind within minutes of starting the station. Indeed, because iHeartRadio appears to program the tracks of popular artists and the particular artist requested at the beginning of the listening session (“frontloading”), and permits users to

⁴ Even for songs in heavier rotations, such as Meghan Trainor’s newest single “Lips Are Movin”—which for the same February week was No. 6 on the Billboard Hot 100 Chart—a terrestrial radio listener could not be sure that he or she would hear the song on the radio even if she listened for an extended period of time. For the week of February 4-10, spins on Z100 for “Lips Are Movin” totaled 39, and there were 51 spins on KIIS. (See Exhibit 2.) Indeed, during that week there was a period of up to approximately 13 hours on Z100, and a period of approximately 8 hours on KIIS in which the track was not played. Even for songs that are played once or twice within a two hour period (which songs are very few), a listener cannot reasonably predict when she will hear it or, depending on listening time, whether she will hear it at all.

⁵ Another simulcast platform, TuneIn Radio, has offered the same ability to search for artists and select a particular station playing a track by that artist. Of course, if iHeartRadio and TuneIn can provide this functionality, so can others.

skip up to six tracks in an hour, a user often hears the particular song desired within seconds of starting the station.

To illustrate this point, our team conducted an experiment using iHeartRadio. We created 25 distinct user accounts with the same demographic information. For each account, we made a “Meghan Trainor” custom station with the goal of hearing her hit songs and “All About that Bass” in particular. We recorded information about every song that was played at the outset of listening. We skipped tracks that were not “All About that Bass,” which was the main song we tested for on-demand listening. In 92% of our trials (23 out of 25 accounts), “All About that Bass” was one of the first seven songs that played. Importantly, iHeartRadio allows us to skip up to six tracks per station (although there appears to be a daily limit on skips for a single account). As a result, we heard the song right away or within a matter of seconds.⁶ Our results also show that in *every case* the first song was either “All About That Bass” (60% of the time) or “Lips Are Movin” (40% of the time)—her two most popular songs.⁷ On 96% of the stations (24/25), *two* or more Meghan Trainor songs were played. Furthermore, in 17 out of 25 cases (68% of the time) iHeart played *three* or more Meghan Trainor songs in the first seven songs played. Finally, of all songs played, 73% were by Meghan Trainor or one of the “featured artists” of that station (Taylor Swift, Demi Lovato, and Ariana Grande). Indeed, only 11 distinct songs were played in the 175 total that we recorded.

⁶ I have attached a record of the results of this experiment as Exhibit 3. An animated demonstration of the experiment is attached as Exhibit 4.

⁷ From our experiment, a motivated user has a 100% chance of hearing either “All About That Bass” or “Lips Are Movin” instantly on iHeartRadio’s custom radio service. By way of comparison, the chance of turning on the radio and hearing either song on one of the local terrestrial radio stations that I mentioned in footnote 4, for the same week (February 4-10), is very small by comparison. The chances are 1.36% on Z100 and 1.60% on KIIS FM (dividing the total amount of airplay for both songs by the amount of total available airplay in a week).

Another experiment I directed involved the creation of stations for the top 20 artists on the Billboard Top 100 Artists Chart, and the creation of a record of the first five songs that played on the station. Our goal was to create an experience that resembled building a playlist on an on-demand service. In *every case*, the first song played was by the requested artist. That is, 100% of the time, iHeart first performed a sound recording by the selected artist. Half of the time (50%) the second sound recording performed was also by the requested artist. The other artists played on the stations we created were easily predicted based on the “features” line of the station – in fact, for each of the 20 artists tested, between three and five songs on the stations were either by the requested artist or the featured artists (and were often among the artist’s new or most popular songs). For example, the Meghan Trainor station, which “features Taylor Swift, Demi Lovato, Ariana Grande and more” played only one out of the first five tracks (“Wanted” by Hunter Hayes) that was *not* by Meghan Trainor or one of these three featured artists.⁸

⁸ The results of this experiment are attached as Exhibit 5.

iHeartRadio | Station Listening

Mark Ronson
 Mark Ronson Radio ❤️
 Feat. Bruno Mars, Amy Winehouse, David Guetta and more

First song played:
 Mark Ronson Radio
 Uptown Funk
 Mark Ronson feat. Bruno Mars

100%
 The first song is by the artist chosen

Based on 20 stations created for the top 20 artists on the Billboard Top 100 chart

As this experiment demonstrates, an iHeartRadio user can both listen to the artist she requests within the first few tracks played *and* can also know which other artists she will likely hear during the same listening session. And the above examples show that the songs played are often the artist's most popular current hits. This functionality gives the user an experience that resembles on-demand listening much more closely than it resembles terrestrial radio. Someone listening to terrestrial radio would be hard pressed to replicate the certainty of hearing their favorite artist 100% of the time that they turn the AM/FM dial.

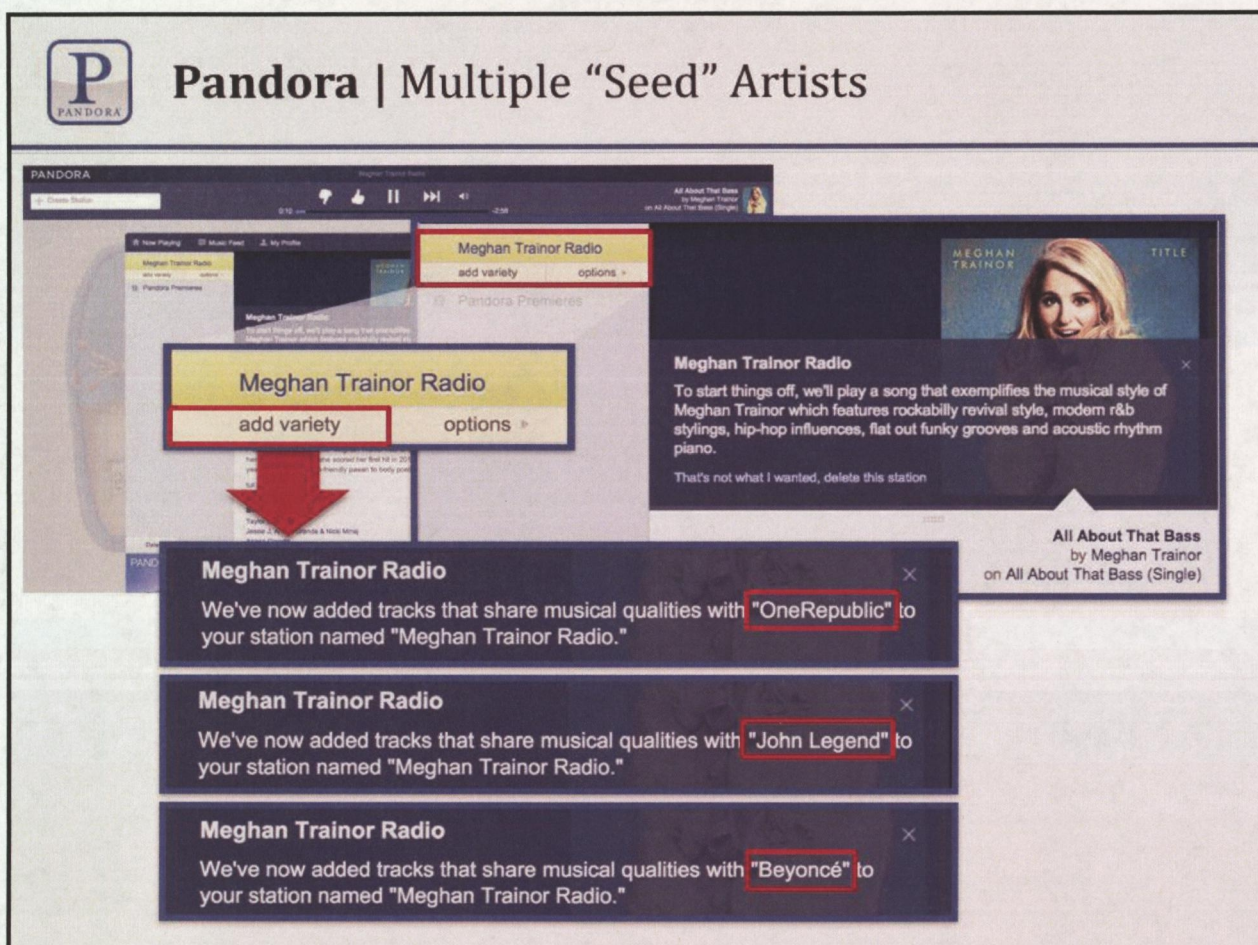
Finally, we noticed that iHeartRadio's custom stations do not appear to run audio advertisements that might interrupt the user experience (although we did see visual ads).⁹ The lack of audio advertising by iHeartRadio is obviously attractive to potential customers who might otherwise be enticed to try an on-demand subscription services. The on-demand services such as Spotify tout the ad-free environment on their paid tier as a selling point in converting users from their free tier.

B. Pandora

Although Pandora has had customized streaming for some time, it has in recent years, added numerous features that bring it even closer to an interactive experience. In 2014, Pandora added a feature to enable users to add multiple "seed" artists or tracks and additional personalization to its channels.¹⁰ Pandora also added personalized station recommendations. As a result, a user can create hyper-personalized stations by adding a series of artists that the user wants to hear.

⁹ iHeartRadio's own website confirms this observation: "Simply pick a song or artist to create your own commercial-free, uninterrupted Custom Station featuring music from that artist and similar ones." "Welcome to iHeartRadio: About Us" iHeartRadio.com *available at* <<http://news.iheart.com/articles/about-iheartradio-390884/welcome-to-iheartradio-6906244/>>. As Mr. Pittman stated: "We're still commercial-free on the iHeartRadio custom feature, because we can't figure out exactly how to put ads in a music collection." *Clear Channel CEO Bob Pittman: "Radio Is A Party"*, RadioILOVEIT.com *available at* <<http://www.radioiloveit.com/radio-personality-radio-personalities/clear-channel-ceo-bob-pittman-radio-is-a-party/>>.

¹⁰ Pandora's Blog describes how the service has evolved to "further personalize" the user experience by giving users the ability to review their station history, add variety to a station, and change "thumbs." *Get A Little More Personal with our New Design*, Pandora Blog, *available at* <<http://blog.pandora.com/2015/01/30/get-a-little-more-personal-with-our-new-design/>>. Popular reporting has noted this trend as well, observing that the new Pandora features "make[] it easier to personalize your radio experience." *Pandora Revamps its Mobile Apps with New UI, More Personalization*, GigaOm *available at* <<https://gigaom.com/2014/12/02/pandora-revamps-its-mobile-apps-with-new-ui-more-personalization/>>.



Pandora's CEO, Brian McAndrews, recently explained Pandora's convergence efforts to investors (*emphasis added*):

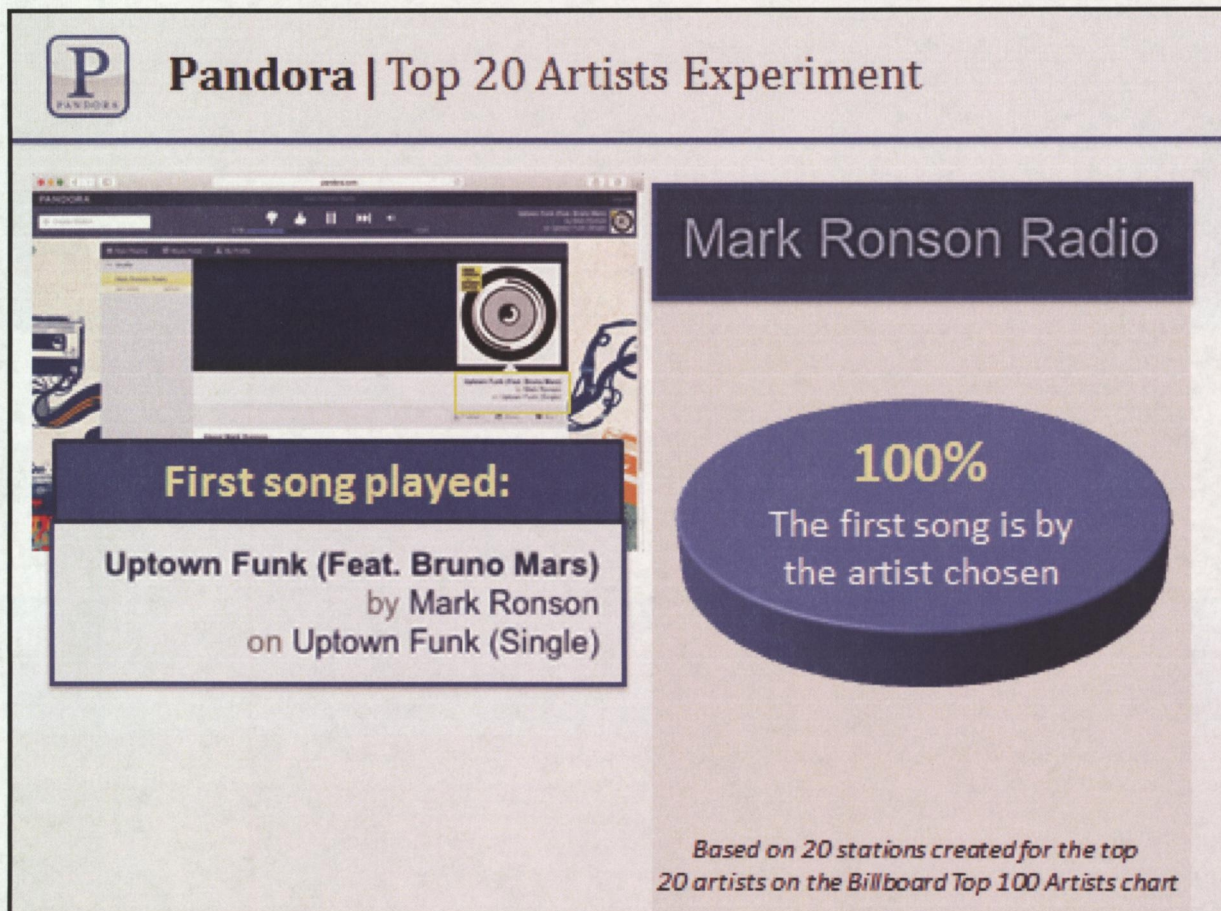
We are in the *very early stages* of developing new ways to engage our listeners with our recent launches and station personalization, station recommendation and notification, . . . Looking ahead we have the right vision and team to make our listening experience even more personalized, ubiquitous and effortless and we will continue to invest to bring that vision to life.¹¹

Hence, in its own words, Pandora sees more opportunities for convergence over the next rate term.

¹¹ Pandora's Q4 2014 Earnings Call Transcript, Seeking Alpha, *available at* <http://seekingalpha.com/article/2891856-pandora-media-p-ceo-brian-mcandrews-on-q4-2014-results-earnings-call-transcript?part=single>.

With Pandora, as with iHeartRadio, when creating a “station” based on a current popular artist, a track by that artist (usually one of their most popular tracks) is the *very first* track that plays on the station. We conducted an experiment similar to what we conducted for iHeartRadio to see how often a listener hears the same artists whose names she had used to create the station in the very first or second track chosen. As in the analogous iHeart experiment, we created a Pandora station for each of the top 20 artists on the Billboard Top 100 Artist Chart. We intended to essentially create a listening experience as if we had designed our own “playlist” of our favorite artists. We recorded information about the first song played on each of those stations.¹² For 20 out of 20 stations—or 100%—the *very first song* played was by the requested artist. For 19 of the 20 stations, the first *and* the fifth song were by the requested artist. Of those songs that were not by the “seeded” artist, 52% were from “Similar Artists” as identified by Pandora. As a result, over 70% of all plays were easily predicted as either being from the artist requested or a similar artist.

¹² The results of this experiment are attached as Exhibit 6. An animated demonstration of the experiment is attached as Exhibit 7.



As with iHeartRadio, the user-experience of Pandora's "non-interactive" service approaches that of on-demand streaming. This is further evidence that Pandora and other statutory services compete with interactive subscription services, and that our licenses with the latter provide the most appropriate benchmarks for this rate-setting proceeding.¹³

¹³ *Pandora Station Suggestions Amp Up Personalization*, CNet available at <http://www.cnet.com/news/pandora-station-suggestions-amp-up-personalization/>. This same article reiterates a point made by Dominic Paschel, Pandora's Vice President, that "Pandora's model -- forsaking direct deals with labels to get its music instead through a license structure carved out by regulators -- means Pandora's market is fundamentally bigger. Subscription services like Beats and Spotify have higher licensing costs per track than Pandora, and that sets them up to rely on their ability to entice listeners to become paying subscribers. Pandora, on the other hand, turns to its free, ad-supported service as its big moneymaker. The audience size in the latter case is unfettered by getting listeners to cough up \$10 a year, and so has the size advantage, he noted."

Notably, Pandora also markets itself as an engine of music discovery, but in many ways, these features closely resemble how users interact with Spotify when they are looking for specific artists or tracks to play. The “Similar Artists” feature on Pandora and the “Related Artists” feature on Spotify allow users to explore new music and learn about new (or their favorite) artists. Accordingly, users share a similar experience across both services, as demonstrated by Exhibit 8.

In sum, statutory webcasters have been adding features and functionality that bring the user experience ever closer to that provided by an on-demand subscription service. Given the rapid pace of technological change, I fully expect this phenomenon to continue through the next statutory rate period.

II. On the Flip Side, On-Demand Services Increasingly Offer Functionality Similar to that Traditionally Offered by Statutory Services, Thereby Increasing Competition Between the Two.

Mr. Fleming-Wood, in his written direct testimony, quotes (incompletely) Spotify’s Daniel Ek, to the effect that Mr. Ek does not view Pandora “as a competitor.” Mr. Ek’s full quotation—the italicized portion of which Mr. Fleming-Wood omitted—speaks to the nature of Spotify’s competition with Pandora: “I don’t really view [Pandora] as a competitor. *The rest of the world seems to, for some reason...*”¹⁴ What matters to these proceedings is not what Mr. Fleming-Wood or Mr. Ek say or think about whether they compete, but whether they present consumer offerings that in fact compete in the market for users.

As I demonstrated in the previous section, the statutory services have changed their functionality to compete with interactive services for lean forward listening. The converse also is true: interactive services developed new offerings to compete for lean back listening. In this

¹⁴ See Exhibit 4 to Fleming-Wood Testimony, at 1.

section, I will highlight a few examples in the latter category. These and other examples further undermine the bright line distinctions that Mr. Fleming-Wood, Mr. Pittman and the services try to draw between their services and interactive subscription services.

A. Spotify

Since launching in the U.S. in July 2011, Spotify added a “Radio” feature that approximates the experience offered by statutory webcasters offering custom radio. It even includes “thumbs” like Pandora.¹⁵ Spotify users can choose any song or artist and launch a radio station based on the selection—an experience that is very close to that offered by iHeart, Pandora and other statutory services.

Spotify likewise has increased its editorial content and curated playlists—meaning content selected for the user, rather than in response to an on-demand request for a particular track or playlist. Approximately [REDACTED] of total listening on Spotify occurs through listening to playlists created by Spotify or third parties such as Sony Music’s Filtr.¹⁶ This number is up from [REDACTED] just a year ago, showing that Spotify is capturing more lean back listening.

Similarly, Spotify’s user interface has become more focused on recommendations. Curated playlists and suggested artists dominate the home—or “browse”—page. In these and other ways, Spotify is making the on-demand functionality secondary or even unnecessary. These developments allow Spotify to appeal to lean back listeners, increasing convergence and increasing the competition between Spotify and statutory streaming services.

¹⁵ See, e.g., *Spotify, Thumbs up for radio!* (Aug. 10, 2012) available at <https://news.spotify.com/us/2012/08/10/thumbs-up-for-radio/>.

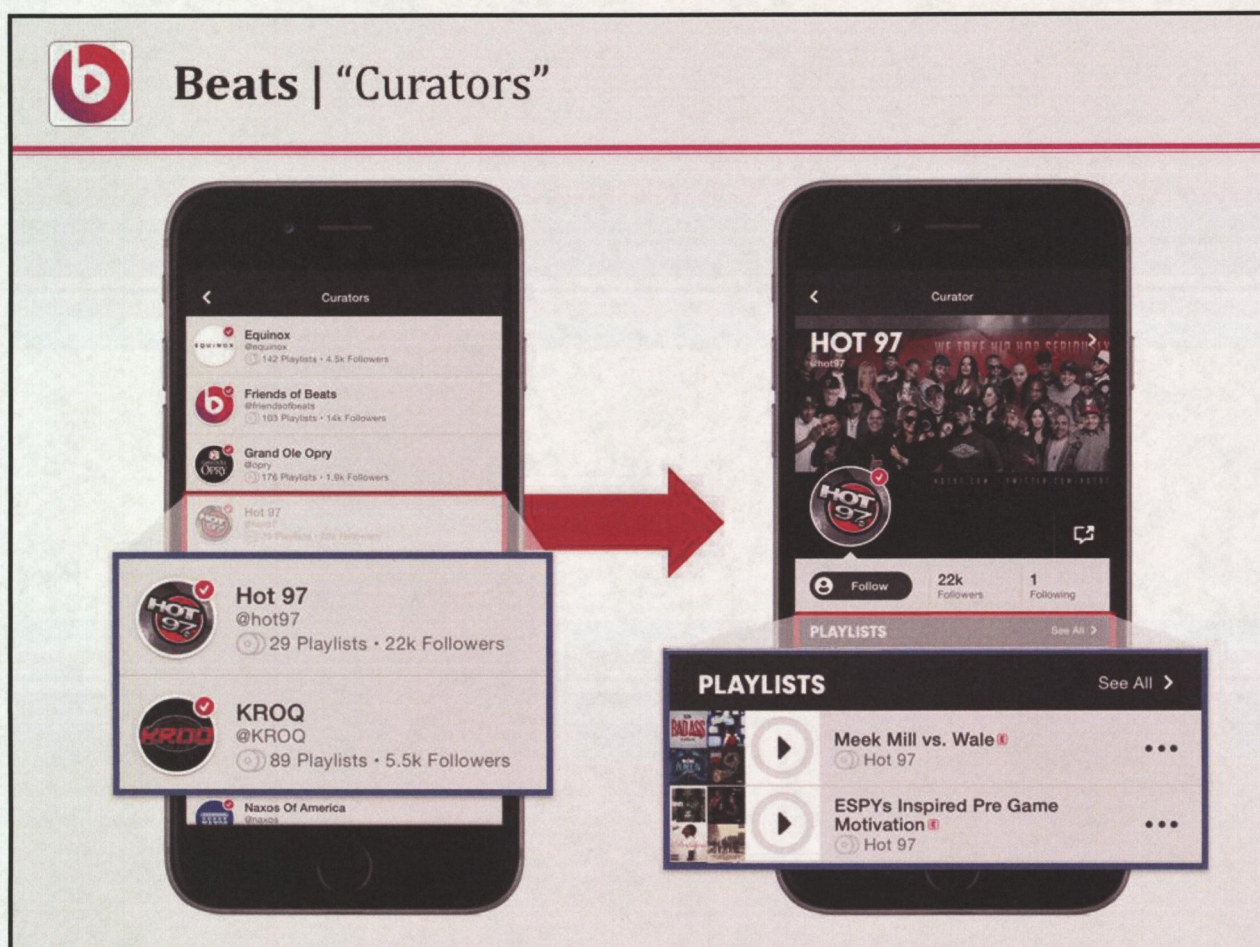
¹⁶ Filtr is Sony Music’s branded playlist application that works with Spotify to create playlists, often featuring our artists, and as a result helps to drive consumption of Sony Music sound recordings on Spotify.

B. Beats

Beats marketed “The Sentence” as a feature that distinguished Beats in the market. The Sentence asks the user for “mood” inputs and then provides a playlist. As the side-by-side comparison below demonstrates, The Sentence is very similar to the “mood” playlist feature that Songza, a statutory service, offers:



Beats also features curated playlists as a part of its subscription offering. As illustrated below, several of these playlists are by popular terrestrial radio stations such as Hot 97 and KROQ.

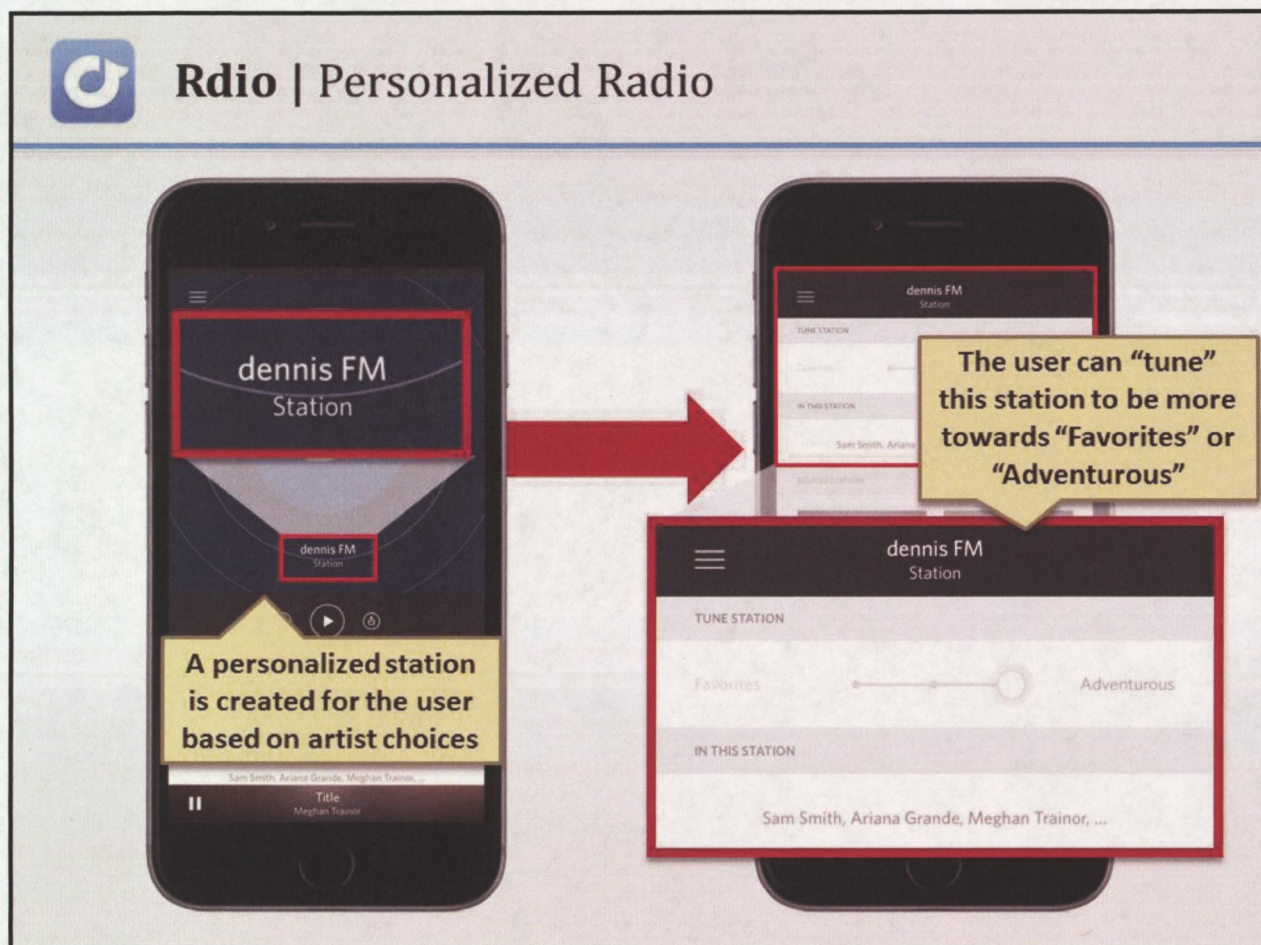


These programmed playlist features make the user experience on Beats similar to that offered by statutory services, including simulcasters. The convergence of consumer offerings and attendant competition between these services is obvious.

C. Rdio

My last example is Rdio, which recently launched a free radio tier that functions like a statutory service. Public articles at the time of Rdio's launch noted the convergence between traditionally on-demand and statutory services: "Rdio VP of Product Chris Becherer told me during a phone interview Wednesday that his company tried to do away with the artificial separation between online radio services like Pandora that offer a leanback experience, and full-fledged subscription offerings like Spotify or Rdio that are often perceived as places where you

primarily go to listen to entire albums.”¹⁷ Upon signing in to Rdio, the user is presented with a personalized station just for them, for example, “@DennisFM.” The user then can “tune” their station to play songs more like their “Favorites,” or to be more “Adventurous,” to hear different types of tracks.



In sum, the examples I have discussed and many others visible in the market demonstrate convergence of consumer offerings—statutory services becoming more lean forward, interactive

¹⁷ *Rdio Launches Personalized Radio Service to Steal Listeners Away from Pandora*, GigaOm.com (August 8, 2013) available at <<https://gigaom.com/2013/08/08/rdio-launches-personalized-radio-stations-to-steal-listeners-away-from-pandora/>>

subscription services becoming more lean back. That convergence will only continue to accelerate over the next five years.

Sony Music supports the free-to-consumer tiers of our licensed partners because they are coupled with conversion incentives that encourage the service to drive paid subscriptions. The statutory services, on the other hand, take advantage of below market rates that subsidize those statutory services at the cost of artists and music creators. As the music market rapidly evolves from an “ownership” model to an “access” model, it is essential that all streaming services contribute the going market royalty rate—a rate currently benchmarked against that paid by interactive services—to the total pool of revenue necessary to ensure that the music industry can continue to invest in sound recordings.

BARGAINING POWER OF INTERACTIVE SERVICES

As noted at the outset, I understand that the Services, through their expert witnesses, have argued that the Judges should disregard Sony Music’s agreements with interactive services because the market is not “workably competitive.” The Services are incorrect.

Our negotiations with interactive services involve extensive give-and-take before we reach a final agreement. Currently, there are prevailing rates in the market that have evolved over time for interactive streaming. Negotiations often vary from these rates and terms to suit the particular services’ needs and the additional value that the service offers Sony Music. The rates and terms very rarely (if ever) match exactly those that Sony Music initially proposed.

For example, in our negotiation for a renewal term with [REDACTED], we ultimately dropped the [REDACTED] [REDACTED] with all its partners, but in circumstances where the partnership with the streaming service is very valuable, such as our partnership with [REDACTED]

[REDACTED]. We estimated that this concession cost us [REDACTED]. I have attached as Exhibit 9 an example of an email that was written contemporaneously with these negotiations that show [REDACTED] negotiating power. In an email dated [REDACTED], one of our lead negotiators reported to me that [REDACTED] [REDACTED]”].

Of course, even services with on-demand functionality have as an ultimate threat that they could alter their service offerings to take advantage of the statutory license. Such a threat serves as significant leverage for the interactive service. For example, in our negotiations with [REDACTED], it was clear to us that [REDACTED] could walk away and opt into the statutory license.

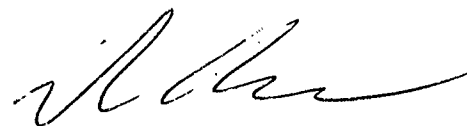
Exhibit 10 shows the impact this had on our negotiations: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]”]. This

illustrates how statutory rate schemes exert downward pressure on rates in negotiations for direct licenses.

Related to all this, I understand that the Judges have requested that the parties provide evidence of a substantial number of marketplace agreements, so that the Judges may assess how robust the market is. I have attached, as Exhibit 11, a CD with the relevant Sony Music agreements with interactive services. A review of the tremendous variations in these agreements—even in different agreements with the same service—demonstrates a wide range of negotiated rates and terms. This and other evidence demonstrates a workably competitive market.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015

A handwritten signature in black ink, appearing to read 'Dennis Kooker', written over a horizontal line.

Dennis Kooker

Exhibits Sponsored By Dennis Kooker

Exhibit No.	Sponsored By	Description
SX EX. 001-RP	Dennis Kooker	Ex. 1 – “All About That Bass” Airplay Charts
SX EX. 002- RP	Dennis Kooker	Ex. 2 – “Lips Are Movin” Airplay Charts
SX EX. 003- RP	Dennis Kooker	Ex. 3 – iHeart – Meghan Trainor Station Experiment Methodology and Results
SX EX. 004- RP	Dennis Kooker	Ex. 4 – iHeart – Meghan Trainor Station Experiment Demonstration
SX EX. 005- RP	Dennis Kooker	Ex. 5 – iHeart – Top 20 Artists Experiment Methodology and Results
SX EX. 006- RP	Dennis Kooker	Ex. 6 – Pandora – Top 20 Artists Experiment Methodology and Results
SX EX. 007- RP	Dennis Kooker	Ex. 7 – Pandora – Top 20 Artist Experiment Demonstration
SX EX. 008- RP	Dennis Kooker	Ex. 8 – Pandora-Spotify Artist Recommendation Features
SX EX. 009- RR	Dennis Kooker	Ex. 9 – [REDACTED]
SX EX. 010- RR	Dennis Kooker	Ex. 10 – [REDACTED]
SX EX. 011- RR	Dennis Kooker	Ex. 11 – CD of Sony Music Agreements


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Jump to a Station: 
**7 Day
Spin Grid
Mainstream Hit**
MEGHAN TRAINOR**All About That Bass**

WHTZ-FM / New York

- Go to Song Analysis Report
- Go to WHTZ-FM Station Playlist
- ☒ Show 12-Week Graph
- Download to Spreadsheet

Past 4 Weeks **LW: Jan 28 - Feb 3****TW: Feb 4 - Feb 10****Updated: Wed Feb 11 3:09 AM
PST**

	Last 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive					Nighttime				
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 10	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Mon	Feb 9	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sun	Feb 8	3	.	.	.	.	.	.	1	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	1
Sat	Feb 7	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	1	.	.
Fri	Feb 6	1	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.
Thu	Feb 5	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Wed	Feb 4	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.

7 Day Total 6

	Previous 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive					Nighttime				
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 3	1	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.
Mon	Feb 2	1	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sun	Feb 1	1	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sat	Jan 31	1	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.
Fri	Jan 30	1	.	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.
Thu	Jan 29	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Wed	Jan 28	1	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.

1 Week Ago 6

	Previous 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive					Nighttime				
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Jan 27	0
Mon	Jan 26	1	1
Sun	Jan 25	2	1	1	.
Sat	Jan 24	0
Fri	Jan 23	0
Thu	Jan 22	0
Wed	Jan 21	0


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Jump to a Station: 
**7 Day
Spin Grid
Mainstream Hit**
MEGHAN TRAINOR**All About That Bass**

KIIS-FM / Los Angeles

- Go to Song Analysis Report
- Go to KIIS-FM Station Playlist
- ☒ Show 12-Week Graph
- Download to Spreadsheet

Past 4 Weeks **LW: Jan 28 - Feb 3****TW: Feb 4 - Feb 10****Updated: Wed Feb 11 3:09 AM
PST**

	Last 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive				Nighttime					
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 10	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Mon	Feb 9	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sun	Feb 8	1	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sat	Feb 7	1	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Fri	Feb 6	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Thu	Feb 5	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Wed	Feb 4	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.

7 Day Total 2

Previous 7 Days Monitored	Total Spins	12m	Overnight					AM Drive					Mid-Day				PM Drive				Nighttime				
			1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 3	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Mon	Feb 2	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sun	Feb 1	1	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Sat	Jan 31	1	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Fri	Jan 30	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Thu	Jan 29	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Wed	Jan 28	0	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.

1 Week Ago 2

Previous 7 Days Monitored		Total Spins	Overnight					AM Drive					Mid-Day				PM Drive				Nighttime					
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Jan 27	0
Mon	Jan 26	0
Sun	Jan 25	2	.	1	1
Sat	Jan 24	2	1	1	.	.	.
Fri	Jan 23	0
Thu	Jan 22	0
Wed	Jan 21	0


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Jump to a Station: 
 7 Day
Spin Grid
Mainstream Hit
MEGHAN TRAINOR**Lips Are Movin**

WHTZ-FM / New York

- Go to Song Analysis Report
- Go to WHTZ-FM Station Playlist
- ☒ Show 12-Week Graph
- Download to Spreadsheet

Past 4 Weeks **LW: Jan 28 - Feb 3****TW: Feb 4 - Feb 10****Updated: Wed Feb 11 3:09 AM PST**

Last 7 Days Monitored		Total Spins	Overnight					AM Drive					Mid-Day				PM Drive				Nighttime					
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 10	7	.	.	1	.	.	.	.	.	.	.	.	1	.	1	.	.	1	.	1	.	1	.	1	.
Mon	Feb 9	5	.	1	.	.	1	.	.	.	.	.	1	.	.	.	.	.	1	.	.	.	.	1	.	.
Sun	Feb 8	5	.	.	.	1	.	.	.	.	.	.	1	.	.	.	.	1	.	.	1	.	1	.	.	.
Sat	Feb 7	7	.	.	1	.	.	1	.	.	.	1	.	.	.	1	.	.	.	.	1	.	1	.	.	1
Fri	Feb 6	7	.	1	.	1	.	.	1	.	.	.	.	1	.	.	.	1	.	.	1	.	1	.	.	.
Thu	Feb 5	4	.	.	1	.	.	.	.	.	.	.	.	.	1	.	.	.	.	1	.	.	.	.	1	.
Wed	Feb 4	4	.	1	.	.	1	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	1

7 Day Total 39

Previous 7 Days Monitored		Total Spins	Overnight					AM Drive					Mid-Day				PM Drive				Nighttime					
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 3	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	1	.	.	.	.	.
Mon	Feb 2	2	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	1	.	.
Sun	Feb 1	2	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	.	1	.	.	.
Sat	Jan 31	4	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	1	.	1	.	.	1
Fri	Jan 30	1	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Thu	Jan 29	2	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	.	.	.	1	.	.
Wed	Jan 28	3	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	1	.	.	.

1 Week Ago 16

Previous 7 Days Monitored		Total Spins	Overnight					AM Drive					Mid-Day				PM Drive				Nighttime					
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Jan 27	3	.	1	.	.	.	.	.	.	.	.	.	.	1	.	.	.	.	.	1	.	.	.	.	.
Mon	Jan 26	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	1
Sun	Jan 25	5	1	1	.	1	.	.	.	1	.	.	.	1	.	.	.
Sat	Jan 24	5	1	1	1	.	.	.	1	.	.	1
Fri	Jan 23	4	.	.	1	1	.	.	.	1	1	.	.	.
Thu	Jan 22	4	1	.	.	.	1	1	.	.	1	.	.
Wed	Jan 21	3	.	.	.	1	1	.	.	.	1	.	.


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 Jump to a Station:


MEGHAN TRAINOR

Lips Are Movin
 KIIS-FM / Los Angeles

- Go to Song Analysis Report
- Go to KIIS-FM Station Playlist
- ☒ Show 12-Week Graph
- Download to Spreadsheet

 Past 4 Weeks
LW: Jan 28 - Feb 3
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Updated: Wed Feb 11 3:09 AM PST

	Last 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive					Nighttime				
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 10	6	.	.	.	1	.	1	.	.	.	1	.	.	.	.	1	.	.	.	1	.	.	.	1	.
Mon	Feb 9	6	.	1	.	.	1	.	.	.	.	.	1	.	.	.	.	1	.	.	1	.	1	.	.	.
Sun	Feb 8	7	.	1	1	.	1	.	.	.	.	.	.	1	.	.	1	.	.	.	.	.	1	.	1	.
Sat	Feb 7	7	.	.	.	1	.	1	.	.	.	1	.	1	.	1	.	.	.	.	.	.	1	.	1	.
Fri	Feb 6	8	.	1	.	1	.	.	.	.	1	.	.	1	.	.	1	.	1	.	1	.	1	.	.	.
Thu	Feb 5	9	1	.	1	.	1	.	.	.	.	1	.	.	.	1	.	1	.	1	.	1	.	1	.	.
Wed	Feb 4	8	.	1	.	1	.	.	.	.	1	.	.	.	1	.	1	.	1	.	1	.	.	.	1	.

7 Day Total 51

	Previous 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive					Nighttime				
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Feb 3	6	1	.	.	.	.	1	.	.	.	1	.	.	.	1	.	1	.	.	.	.	.	.	1	.
Mon	Feb 2	6	.	.	.	1	.	1	.	.	.	.	.	1	.	.	1	.	1	.	1	.	1	.	.	.
Sun	Feb 1	6	.	.	1	.	.	.	1	.	.	.	.	1	.	.	1	.	.	.	1	.	.	.	1	.
Sat	Jan 31	6	.	.	.	1	.	1	.	.	.	1	.	1	.	.	1	.	.	.	.	.	.	1	.	.
Fri	Jan 30	3	.	.	.	.	.	1	.	.	.	.	.	.	.	.	1	.	.	.	.	.	1	.	.	.
Thu	Jan 29	7	.	.	1	.	.	1	.	.	.	.	.	1	.	.	1	.	1	.	1	.	1	.	.	1
Wed	Jan 28	8	.	1	.	.	1	.	.	.	.	1	.	.	1	.	1	.	1	.	1	.	1	.	1	.

1 Week Ago 42

	Previous 7 Days Monitored	Total Spins	Overnight					AM Drive					Mid-Day				PM Drive					Nighttime				
			12m	1a	2a	3a	4a	5a	6a	7a	8a	9a	10a	11a	12n	1p	2p	3p	4p	5p	6p	7p	8p	9p	10p	11p
Tue	Jan 27	7	.	.	.	1	.	.	.	.	.	1	.	1	.	.	1	.	1	.	1	.	1	.	.	.
Mon	Jan 26	7	.	1	.	.	1	.	.	.	.	.	.	1	.	.	1	.	1	.	1	.	.	.	1	.
Sun	Jan 25	8	.	1	.	1	.	1	.	.	.	.	1	.	.	1	.	.	1	.	.	1	.	1	.	.
Sat	Jan 24	6	.	.	.	1	.	.	.	.	1	.	1	.	.	1	.	.	.	1	.	1	.	.	.	.
Fri	Jan 23	6	1	.	1	.	.	1	.	.	.	.	1	.	.	.	1	.	.	.	.	1	.	.	.	.
Thu	Jan 22	6	.	.	.	.	1	.	.	.	.	.	.	1	.	1	.	1	.	.	1	.	.	1	.	.
Wed	Jan 21	10	.	1	.	1	1	.	1	.	.	.	1	.	1	.	1	.	1	.	1	.	1	.	.	1

iHeartRadio Meghan Trainor Station Experiment

OVERVIEW OF EXPERIMENT: This experiment was designed to test an iHeartRadio user's ability to hear Meghan Trainor's hit songs, and particularly "All About That Bass," immediately after creating a custom station based on the artist, Meghan Trainor.

METHODOLOGY: We created a new iHeartRadio account for each trial (25 total), one without any previous listening biases, based on standard age and zip code information. Next, we created a custom radio station seeded with the artist, Meghan Trainor, and recorded each song played in order. We continued to do this until reaching the six-skip limit, ultimately recording the first seven songs that came on the station. I repeated this process twenty-four more times, creating a new account each time and then playing the first seven songs on the Meghan Trainor custom radio station.

RESULTS: The table on the following page lists the results of the experiment. Those songs highlighted in green are instances when "All About That Bass" played, and those in yellow are other Meghan Trainor songs.

- 92% of the time (23/25 stations) I was able to get "All About That Bass" to play within the first seven songs on the Meghan Trainor custom radio station
- 60% of the time (15/25 stations) "All About That Bass" was the first song to play. The other 40% of the time (10/25 stations) "Lips Are Movin" was the first song to play.
- 96% of the time (24/25 stations) two or more Meghan Trainor songs were played within the first seven songs.
- 68% of the time (17/25 stations) three or more Meghan Trainor songs were played within the first seven songs
- On average, 73% of all songs played were either by Meghan Trainor or a "featured artist."
- Only ten other songs were played among the first seven songs on the twenty-five accounts:
 1. Lips Are Movin - Meghan Trainor (22/25 stations)
 2. Title - Meghan Trainor (18/25 stations)
 3. Dear Future Husband - Meghan Trainor (5/25 stations)
 4. Shake It Off - Taylor Swift (24/25 stations)
 5. Really Don't Care - Demi Lovato (feat. Cher Lloyd) (21/25 stations)
 6. Love Me Harder - Ariana Grande (15/25 stations)
 7. Beg For It - Iggy Azalea (15/25 stations)
 8. A Thousand Years - Christina Perri (20/25 stations)
 9. Want U Back - Cher Lloyd (7/25 stations)
 10. Dark Horse - Katy Perry (5/25 stations)

RESULTS TABLE:

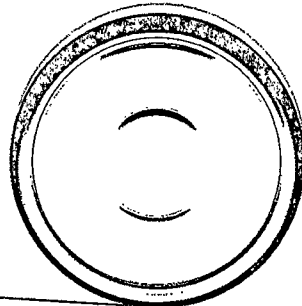
Station based on: Meghan Trainor (artist)

Featured Artists: Taylor Swift, Demi Lovato, Ariana Grande

Email Account	Song 1	Song 2	Song 3	Song 4	Song 5	Song 6	Song 7	MT count	Feat. Artist count	Total MT + feat. Artist
1. Email Account 1	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Title Meghan Trainor	Beg For It Iggy Azalea	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	A Thousand Years Christina Perri	3	2	5
2. Email Account 2	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Beg For It Iggy Azalea	Love Me Harder Ariana Grande	A Thousand Years Christina Perri	Want U Back Cher Lloyd	1	3	4
3. Email Account 3	Lips Are Movin Meghan Trainor	Shake It Off Taylor Swift	Title Meghan Trainor	Love Me Harder Ariana Grande	All About That Bass Meghan Trainor	A Thousand Years Christina Perri	Dark Horse Katy Perry	3	2	5
4. Email Account 4	Lips Are Movin Meghan Trainor	All About That Bass Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Shake It Off Taylor Swift	Title Meghan Trainor	Beg For It Iggy Azalea	Love Me Harder Ariana Grande	3	3	6
5. Email Account 5	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Title Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Lips Are Movin Meghan Trainor	Want U Back Cher Lloyd	A Thousand Years Christina Perri	3	2	5
6. Email Account 6	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Love Me Harder Ariana Grande	Lips Are Movin Meghan Trainor	Dark Horse Katy Perry	A Thousand Years Christina Perri	2	3	5
7. Email Account 7	Lips Are Movin Meghan Trainor	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Title Meghan Trainor	A Thousand Years Christina Perri	Dear Future Husband Meghan Trainor	4	2	6
8. Email Account 8	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Shake It Off Taylor Swift	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Love Me Harder Ariana Grande	Beg For It Iggy Azalea	Want U Back Cher Lloyd	2	3	5
9. Email Account 9	Lips Are Movin Meghan Trainor	Shake It Off Taylor Swift	Love Me Harder Ariana Grande	Title Meghan Trainor	Beg For It Iggy Azalea	Want U Back Cher Lloyd	A Thousand Years Christina Perri	2	2	4
10. Email Account 10	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Shake It Off Taylor Swift	Love Me Harder Ariana Grande	A Thousand Years Christina Perri	Dear Future Husband Meghan Trainor	3	3	6
11. Email Account 11	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Love Me Harder Ariana Grande	A Thousand Years Christina Perri	Beg For It Iggy Azalea	2	3	5
12. Email Account 12	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	All About That Bass Meghan Trainor	Beg For It Iggy Azalea	Shake It Off Taylor Swift	Want U Back Cher Lloyd	Dear Future Husband Meghan Trainor	3	2	5
13. Email Account 13	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Beg For It Iggy Azalea	Love Me Harder Ariana Grande	Really Don't Care Demi Lovato (feat. Cher Lloyd)	A Thousand Years Christina Perri	Dear Future Husband Meghan Trainor	3	2	5
14. Email Account 14	All About That Bass Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Love Me Harder Ariana Grande	Shake It Off Taylor Swift	Lips Are Movin Meghan Trainor	A Thousand Years Christina Perri	Title Meghan Trainor	3	3	6
15. Email Account 15	Lips Are Movin Meghan Trainor	Shake It Off Taylor Swift	Title Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	All About That Bass Meghan Trainor	Dark Horse Katy Perry	Dear Future Husband Meghan Trainor	4	2	6
16. Email Account 16	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Title Meghan Trainor	Beg For It Iggy Azalea	A Thousand Years Christina Perri	Want U Back Cher Lloyd	2	2	4
17. Email Account 17	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Shake It Off Taylor Swift	Title Meghan Trainor	A Thousand Years Christina Perri	Beg For It Iggy Azalea	3	2	5
18. Email Account 18	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Title Meghan Trainor	Love Me Harder Ariana Grande	Really Don't Care Demi Lovato (feat. Cher Lloyd)	A Thousand Years Christina Perri	Lips Are Movin Meghan Trainor	3	3	6
19. Email Account 19	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Love Me Harder Ariana Grande	Title Meghan Trainor	Shake It Off Taylor Swift	Want U Back Cher Lloyd	3	3	6
20. Email Account 20	Lips Are Movin Meghan Trainor	Shake It Off Taylor Swift	Beg For It Iggy Azalea	Love Me Harder Ariana Grande	Title Meghan Trainor	A Thousand Years Christina Perri	Dark Horse Katy Perry	2	2	4
21. Email Account 21	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Beg For It Iggy Azalea	Shake It Off Taylor Swift	Title Meghan Trainor	Really Don't Care Demi Lovato (feat. Iggy Azalea)	A Thousand Years Christina Perri	3	2	5
22. Email Account 22	All About That Bass Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	Title Meghan Trainor	Shake It Off Taylor Swift	Beg For It Iggy Azalea	Dark Horse Katy Perry	A Thousand Years Christina Perri	2	2	4
23. Email Account 23	All About That Bass Meghan Trainor	Lips Are Movin Meghan Trainor	Beg For It Iggy Azalea	Shake It Off Taylor Swift	Title Meghan Trainor	Love Me Harder Ariana Grande	A Thousand Years Christina Perri	3	2	5
24. Email Account 24	Lips Are Movin Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Beg For It Iggy Azalea	A Thousand Years Christina Perri	Title Meghan Trainor	3	2	5
25. Email Account 25	Lips Are Movin Meghan Trainor	All About That Bass Meghan Trainor	Shake It Off Taylor Swift	Title Meghan Trainor	Really Don't Care Demi Lovato (feat. Cher Lloyd)	A Thousand Years Christina Perri	Love Me Harder Ariana Grande	3	3	6

☐ = All About That Bass

☐ = Other Meghan Trainor Song



SoundExchange - Written Rebuttal Testimony
Kooker, SX EX. 004, 007, 008 Videos PUBLIC
Dkt. No. 14-CRB-0001-WR (2016-2020) (Web IV)

SX EX. 004- RP

Document Produced in Native Format

iHeartRadio Top 20 Artists Experiment

OVERVIEW OF EXPERIMENT: The aim of this experiment was to replicate the experience of making a playlist of artists—in this case, the top 20 on the Billboard Top 100 Artists Chart.

METHODOLOGY: We created a new iHeartRadio account, one without any previous listening biases, based on standard age and demographic information. Next, we created a custom station seeded with the artist at the top of the Billboard Top 100 Artists Chart for the week of February 21, 2015: Taylor Swift. As a typical user would, we skipped some songs and not others. No songs were thumbed down or up. We recorded when a song by the “seed” artist played and also when the “featured artists” played. After five songs, we moved on to the number two artist on the Top 100 Artists Chart, Ed Sheeran, and did the same thing. Following this pattern we progressed through the first 20 artists of the Top 100.

The twenty stations I created were based on the following artists:

1. Taylor Swift
2. Ed Sheeran
3. Sam Smith
4. Maroon 5
5. Meghan Trainor
6. Katy Perry
7. Nicki Minaj
8. Mark Ronson
9. Hozier
10. Fall Out Boy
11. Bruno Mars
12. Fifth Harmony
13. Beyonce
14. Missy Elliott
15. Ariana Grande
16. Ne-Yo
17. Ellie Goulding
18. Bob Dylan
19. Nick Jonas
20. The Weeknd

RESULTS: The table on the following page lists the results of the experiment. Those songs highlighted in green are by the same artist on which the station was based, and those in yellow are by a featured artist of the station’s primary artist.

- 100% of the time the **first song played** was by the requested artist.
- 50% of the time the **second song played** was also by the requested artist.
- 100% of the time **three or more** of the first five songs were by the requested artist or a “featured artist.”

RESULTS TABLE:

Station	Song 1	Song 2	Song 3	Song 4	Song 5	artist total	featured total	artist + featured
1. Station Artist: Taylor Swift Featured Artists: Cheyenne Kimball, Hayden Panettiere, Meghan Trainor	Shake It Off Taylor Swift	Style Taylor Swift	Wanted Hunter Hayes	Blank Space Taylor Swift	All About That Bass Meghan Trainor	3	1	4
2. Station Artist: Ed Sheeran Featured Artists: The Script, Sam Smith, The Fray	Thinking Out Loud Ed Sheeran	Don't Ed Sheeran	Breakeven The Script	I'm Not The Only One Sam Smith	I Lived One Republic	2	2	4
3. Station Artist: Sam Smith Featured Artists: MAGIC!, Ed Sheeran, Nick Jonas	Stay With Me Sam Smith	Rude MAGIC!	Latch Sam Smith	Jealous Nick Jonas	Me And My Broken Heart Rixton	2	2	4
4. Station Artist: Maroon 5 Featured Artists: The Script, Katy Perry, Imagine Dragons	Maps Maroon 5	Animals Maroon 5	I Bet My Life Imagine Dragons	Sugar Maroon 5	Dark Horse Katy Perry	3	2	5
5. Station Artist: Meghan Trainor Featured Artists: Taylor Swift, Demi Lovato, Ariana Grande	Lips Are Movin Meghan Trainor	Heart Attack Demi Lovato	Love Me Harder Ariana Grande	Title Meghan Trainor	Want U Back Cher Lloyd	2	2	4
6. Station Artist: Katy Perry Featured Artists: Ariana Grande, Miley Cyrus, Selena Gomez	Roc-A Katy Perry	Wrecking Ball Miley Cyrus	Wide Awake Katy Perry	The Heart Wants What It Wants Selena Gomez	Stay Rihanna	2	2	4
7. Station Artist: Nicki Minaj Featured Artists: Tyga, Iggy Azalea, Rihanna	Moment 4 Life Nicki Minaj	Motivation Kelly Rowland	No Worries Lil Wayne	Beg For It Iggy Azalea	Hookah Tyga	1	2	3
8. Station Artist: Mark Ronson Featured Artists: Bruno Mars, Amy Winehouse, David Guetta	Uptown Funk Mark Ronson (feat. Bruno Mars)	Locked Out Of Heaven Bruno Mars	Rehab Amy Winehouse	Weight of Love The Black Keys	Titanium David Guetta (feat. Sia)	1	3	4
9. Station Artist: Hozier Featured Artists: Milky Chance, Vance Joy, Sam Smith	From Eden (Album Version) Hozier	Stolen Dance Milky Chance	Take Me To Church (Album Version) Hozier	Sweater Weather The Neighbourhood	Riptide Vance Joy	2	2	4
10. Station Artist: Fall Out Boy Featured Artists: Panic At The Disco, Paramore, Imagine Dragons	My Songs Know What You Did In The Dark Fall Out Boy	Centuries Fall Out Boy	Gives You Hell The All-American Rejects	Ain't It Fun Paramore	Sugar, We're Goin Down Fall Out Boy	3	1	4
11. Station Artist: Bruno Mars Featured Artists: Pharrell Williams, Ariana Grande, Maroon 5	Just The Way You Are Bruno Mars	When I Was Your Man Bruno Mars	Happy (From "Despicable Me 2") Pharrell Williams	Classic MKTO	Style Taylor Swift	2	1	3
12. Station Artist: Fifth Harmony Featured Artists: Becky G., Demi Lovato, Meghan Trainor	Sledgehammer Fifth Harmony	BO\$\$ Fifth Harmony	Shower Becky G.	Butter Together Fifth Harmony	All About That Bass Meghan Trainor	3	2	5
13. Station Artist: Beyonce Featured Artists: Destiny's Child, Rihanna, Fergie	7/11 Beyonce	Say My Name Destiny's Child	Partition (Explicit Version) Beyonce	She Knows Ne-Yo	Drunk in Love Beyonce (feat. Jay-Z)	3	1	4
14. Station Artist: Missy Elliott Featured Artists: Outkast, Aaliyah, Mya	Work It (Promo LP Version) Missy Elliott	Lose Control Missy Elliott (feat. Ciara & Fat Man Scoop)	Rock The Boat Aaliyah	Get Ur Freak On Missy Elliott	Apologize Timbaland	3	1	4
15. Station Artist: Ariana Grande Featured Artists: Iggy Azalea, Meghan Trainor, Selena Gomez	Love Me Harder Ariana Grande	Break Free Ariana Grande	Heart Attack Demi Lovato	Problem Ariana Grande	Dark Horse Katy Perry	3	0	3
16. Station Artist: Ne-Yo Featured Artists: Usher, Mario, Fabolous	Let Me Love You (Until You Learn To Love Yourself) Ne-Yo	Let Me Love You Mario	So Sick Ne-Yo	I Don't Mind Usher (feat. Juicy J)	All Of Me (Album Version) John Legend	2	2	4
17. Station Artist: Ellie Goulding Featured Artists: Sia, Jessie J, Lana Del Rey	Burn Ellie Goulding	Chandelier Sia	Lights Ellie Goulding	Royals Lorde	Summertime Sadness Lana Del Rey	2	2	4
18. Station Artist: Bob Dylan Featured Artists: Bob Dylan & The Band, Neil Young, John Lennon	Like A Rolling Stone (Album Version) Bob Dylan	Knockin' On Heaven's Door (Album Version) Bob Dylan	Imagine (2010 - Remaster) John Lennon	Heart of Gold (Remastered Album Version) Neil Young	Tangled Up In Blue (Album Version) Bob Dylan	3	2	5
19. Station Artist: Nick Jonas Featured Artists: Nick Jonas & The Administration, Shawn Mendes, Meghan Trainor	Chains Nick Jonas	Jealous Nick Jonas	Who I Am Nick Jonas & The Administration	Maps Maroon 5	Teacher Nick Jonas	3	1	4
20. Station Artist: The Weeknd Featured Artists: Jhene Aiko, August Alsina, PARTYNEXTDOOR	Wicked Games The Weeknd	No Love August Alsina	Earned It (Fifty Shades Of Grey) The Weeknd	Or Nah Wiz Khalifa and DJ Mustard	The Worst Jhene Aiko	2	2	4

☐ = Song By Seeded Artist

☐ = Song By Featured Artist

Pandora Top 20 Artists Experiment

OVERVIEW OF EXPERIMENT: The aim of this experiment was to replicate the experience of making a playlist of artists—in this case, the top 20 on the Billboard Top 100 Artists Chart.

METHODOLOGY: We created a new Pandora account, one without any previous listening biases, based on standard age and demographic information. Next, we created a custom station seeded with the artist at the top of the Billboard Top 100 Artists Chart for the week of February 21, 2015: Taylor Swift. As a typical user would, we skipped some songs and not others. No songs were thumbed down or up. We recorded when a song by the “seed” artist played and also when a “Similar Artist” (as noted by Pandora) played. After five songs, we moved on to the number two artist on the Top 100 Artists Chart, Ed Sheeran, and did the same thing. Following this pattern we progressed through the first 20 artists of the Top 100.

The twenty stations I created were based on the following artists:

1. Taylor Swift
2. Ed Sheeran
3. Sam Smith
4. Maroon 5
5. Meghan Trainor
6. Katy Perry
7. Nicki Minaj
8. Mark Ronson
9. Hozier
10. Fall Out Boy
11. Bruno Mars
12. Fifth Harmony
13. Beyonce
14. Missy Elliott
15. Ariana Grande
16. Ne-Yo
17. Ellie Goulding
18. Bob Dylan
19. Nick Jonas
20. The Weeknd

RESULTS: The table on the following page lists the results of the experiment. Those songs highlighted in green are by the same artist on which the station was based, and those in yellow are by a “Similar Artist” of the station’s primary artist.

- 100% of the time the **first song played** was by the requested artist.
- 95% of the time the requested artist **played twice** within the first five songs.

- 85% of the time at least **three of the first five songs** were by the requested artist or a "Similar Artist."
- 50% of the time at least **four of the first five songs** were by the requested or a "Similar Artist."

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- 50% of the time at least **four of the first five songs** were by the requested or a “Similar Artist.”

Station	Song 1	Song 2	Song 3	Song 4	Song 5	artist total	similar total	artist + similar
1. Station Artist: Taylor Swift Similar Artists: Ed Sheeran, The Band Perry, Carrie Underwood, Rascal Flatts	You Belong With Me - Taylor Swift	Just A Dream - Carrie Underwood	If I Die Young - The Band Perry	What Hurts The Most - Rascal Flatts	22 - Taylor Swift	2	3	5
2. Station Artist: Ed Sheeran Similar Artists: Sam Smith, Ron Pope, Parachute, Hozier	Give Me Love - Ed Sheeran	Take Me To Church - Hozier	I'm Not The Only One - Sam Smith	Free Fallin' (Acoustic)(Live) - John Mayer	I See Fire - Ed Sheeran	2	2	4
3. Station Artist: Sam Smith Similar Artists: Ed Sheeran, Disclosure, Hozier, Meghan Trainor	Lay Me Down (Acoustic Version) - Sam Smith	Tenerife Sea - Ed Sheeran	Stay With You - John Legend	La La La (ft. Sam Smith) - Naughty Boy	Latch (Acoustic) - Sam Smith	2	1	3
4. Station Artist: Maroon 5 Similar Artists: OneRepublic, Maroon 5 & Christina Aguilera, Jason Mraz, Imagine Dragons	Misery - Maroon 5	Stop And Stare - OneRepublic	You Found Me - The Fray	Best Day Of My Life - American Authors	Animals - Maroon 5	2	1	3
5. Station Artist: Meghan Trainor Similar Artists: Taylor Swift, Jessie J, Ariana Grande & Nicki Minaj, Ariana Grande, Mark Ronson	All About That Bass - Meghan Trainor	Stay With Me - Sam Smith	Price Tag - Jessie J	Cool Kids - Echosmith	Dear Future Husband - Meghan Trainor	2	0	2
6. Station Artist: Katy Perry Similar Artists: Taylor Swift, Maroon 5, Rihanna, Kesha	California Gurls - Katy Perry	We Found Love - Rihanna	Stronger (What Doesn't Kill You) - Kelly Clarkson	Tik Tok - Kesha	Teenage Dream - Katy Perry	2	2	4
7. Station Artist: Beyonce Similar Artists: Nicki Minaj, Beyonce, Rihanna, Drake, Lil Wayne	Super Bass - Nicki Minaj	Drunk In Love - Beyonce	The Motto - Drake	You Da One - Rihanna	Moment 4 Life - Nicki Minaj	2	3	5
8. Station Artist: Mark Ronson Similar Artists: Amy Winehouse, Madcon, The Roots, Ivy Levan	Uptown Funk (ft. Bruno Mars) - Mark Ronson	Valerie (BBC Sessions) - Amy Winehouse	Right As Rain - Adele	American Boy - Estelle	Toxic - Mark Ronson	2	1	3
9. Station Artist: Hozier Similar Artists: Vance Joy, Milky Chance, Ed Sheeran, The Lumineers	Someone New - Hozier	Drop The Game (R&B Mixtape Edit) - Flume & Chet Faker	Unsteady - X Ambassadors	99 Problems - Hugo (Rock)	Cherry Wine (Live) - Hozier	2	0	2
10. Station Artist: Fall Out Boy Similar Artists: Panic At The Disco, Paramore, My Chemical Romance, The Offspring	Dance, Dance - Fall Out Boy	Misery Business - Paramore	New Perspective - Panic At The Disco	Welcome To The Black Parade (Edit) - My Chemical Romance	Irresistible - Fall Out Boy	2	3	5
11. Station Artist: Bruno Mars Similar Artists: Mark Ronson, Jason Mraz, Sam Smith, OneRepublic	Marry You - Bruno Mars	A Thousand Years - Christina Perri	Maps - Maroon 5	Thinking Out Loud - Ed Sheeran	Locked Out Of Heaven - Bruno Mars	2	0	2
12. Station Artist: Fifth Harmony Similar Artists: Taylor Swift, Ariana Grande, Meghan Trainor, Jessie J, Ariana Grande & Nicki Minaj	Better Together - Fifth Harmony	Blank Space - Taylor Swift	Love Me Harder (ft. The Weeknd) - Ariana Grande	Impossible - Shontelle	Sledgehammer - Fifth Harmony	2	2	4
13. Station Artist: Beyonce Similar Artists: Nicki Minaj, Rihanna, Kanye West & Paul McCartney, Destiny's Child, Rihanna	7/11 - Beyonce	Rude Boy - Rihanna	The Crying Game - Nicki Minaj	Say My Name - Destiny's Child	Flawless Remix (ft. Nicki Minaj) - Beyonce	2	3	5
14. Station Artist: Missy Elliott Similar Artists: Eve, Busta Rhymes, Outkast, Ludacris	Gossip Folks - Missy Elliott	Goodies - Ciara	Tambourine - Eve	Dirt Off Your Shoulder - Jay-Z	Get Ur Freak On - Missy Elliott	2	1	3
15. Station Artist: Ariana Grande Similar Artists: Taylor Swift, Jessie J, Ariana Grande & Nicki Minaj, Iggy Azalea, Selena Gomez	Piano - Ariana Grande	Black Widow (ft. Rita Ora) - Iggy Azalea	Unconditionally - Katy Perry	Talk Dirty - Jason DeRulo	The Way - Ariana Grande	2	1	3
16. Station Artist: Ne-Yo Similar Artists: Mario, Usher, Trey Songz, Chris Brown	Sexy Love - Ne-Yo	Hate That I Love You - Rihanna	With You - Chris Brown	My Boo - Usher	Let Me Love You (Until You Learn To Love Yourself) - Ne-Yo	2	2	4
17. Station Artist: Ellie Goulding Similar Artists: Calvin Harris, Lana Del Rey, Flight Facilities, Tove Lo	Your Biggest Mistake - Ellie Goulding	Spectrum - Zedd	Titanium - David Guetta	Sweet Nothing - Calvin Harris	Young And Beautiful - Lana Del Rey	1	2	3
18. Station Artist: Bob Dylan Similar Artists: Neil Young, The Band, The Beatles, Buffalo Springfield	Blowin' In The Wind - Bob Dylan	Into the Mystic - Van Morrison	The Weight - The Band	The Needle & The Damage Done - Neil Young	Alberty #2 - Bob Dylan	2	2	4
19. Station Artist: Nick Jonas Similar Artists: Taylor Swift, Mark Ronson, Ed Sheeran, Ariana Grande	Teacher - Nick Jonas	Sirens - Cher Lloyd	I Know Places - Taylor Swift	Leavin' - Jesse McCartney	Introducing Me - Nick Jonas	2	1	3
20. Station Artist: The Weeknd Similar Artists: Drake, Wiz Khalifa, Ty Dolla \$ign, Frank Ocean	Next - The Weeknd	Doing It Wrong - Drake	Or Nah (ft. The Weeknd, Wiz Khalifa And DJ Mustard) (Remix) - Ty Dolla \$ign	Poetic Justice - Kendrick Lamar	Houses Of Balloons/Glass Table - The Weeknd	2	2	4

☐ = Song By Seeded Artist

☐ = Song By Featured Artist

SX EX. 007- RP

Document Produced in Native Format

SX EX. 008- RP

Document Produced in Native Format

SX EX. 009 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 010 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 011 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

)
)
)
) DOCKET NO. 14-CRB-0001-WR
) (2016-2020)
)
)
)

WRITTEN REBUTTAL TESTIMONY OF

AARON HARRISON

Senior Vice President, Business & Legal Affairs,
Global Digital Business, UMG Recordings, Inc.

PUBLIC VERSION

Witness for SoundExchange, Inc.

REBUTTAL TESTIMONY OF AARON HARRISON

BACKGROUND

1. I am Senior Vice President, Business & Legal Affairs, Global Digital Business, UMG Recordings, Inc. My responsibilities include negotiating deals for the digital use of the recorded music repertoire of Universal Music Group (“UMG”). My written direct testimony sets forth my background in greater detail.

2. I have reviewed the public redacted written direct testimony of Prof. Carl Shapiro (“Shapiro WDT”) and a version of the amended written direct testimony of Profs. Daniel Fischel and Douglas Lichtman (“Fischel & Lichtman WDT”) that has certain information regarding UMG unredacted. I understand that all three of these witnesses argue that the Judges should view the market for agreements with non-interactive services as “workably competitive,” and the market for agreements with interactive services as not workably competitive, because these witnesses believe that non-interactive services can “steer” listeners to the music of particular labels, while interactive services purportedly cannot. (Shapiro WDT at 10-15; Fischel & Lichtman WDT, at 59.)

3. Profs. Shapiro, Fischel and Lichtman are wrong. Interactive services have the ability to influence what is played by users (or “steer”). Hence, our negotiations with all these services in a market without a statutory license would not be distinguished by a service’s ability to steer. That ability is present in the entirely workably competitive market for interactive services to use our sound recordings.

4. I have also reviewed the public written direct testimony of Prof. Michael Katz (“Katz WDT”). I understand Prof. Katz to argue that the interactive services are not good

benchmarks because the major record labels can extract *above* monopolistic prices. (Katz WDT, at 31-34.)

5. Prof. Katz's observations are wrong as to UMG. Our negotiations with interactive services involve substantial back-and-forth, and we are unable to dictate the terms or prices of our licenses.

6. I also understand that Profs. Fischel and Lichtman rely, in part, on a term sheet exchanged between Clear Channel and UMG to suggest that the market for simulcast rates is not amenable to a "greater-of" rate structure. (Fischel & Lichtman WDT at 44-45.)

7. Profs. Fischel and Lichtman are wrong about this, too. The term sheets exchanged between Clear Channel and UMG show that simulcasters *could* operate under a "greater-of" rate structure.

DISCUSSION

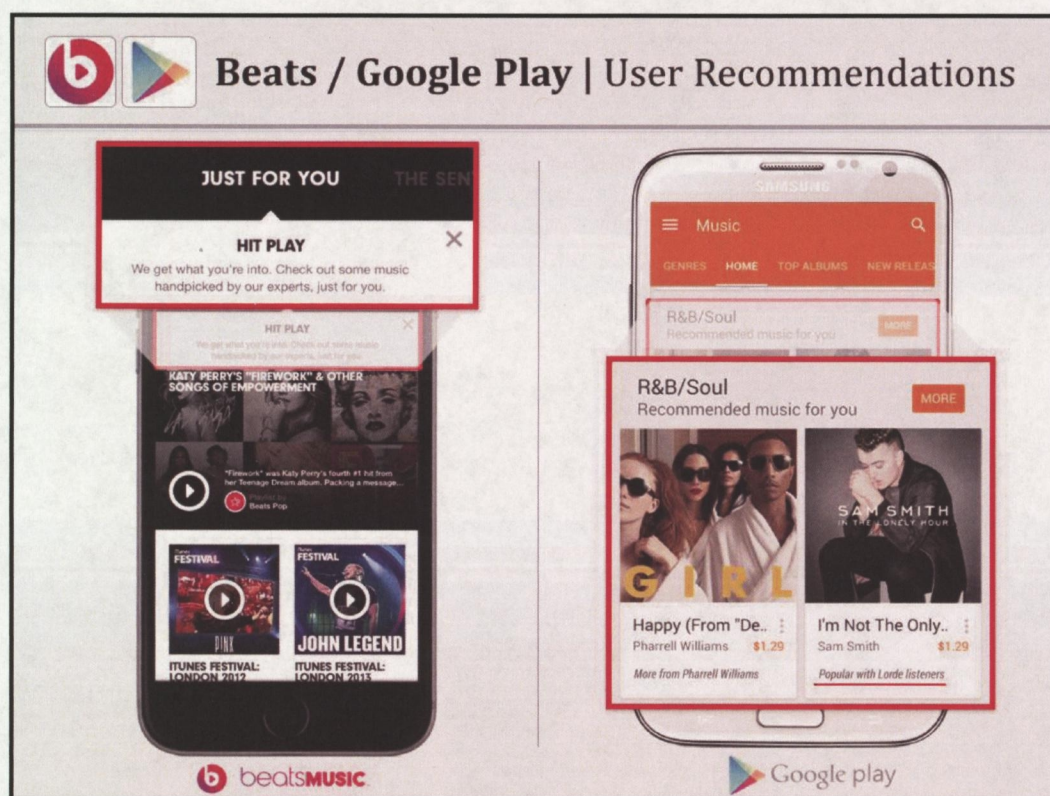
I. Agreements with Interactive Streaming Services Are Appropriate Market Evidence

8. Absent the statutory license, non-interactive and interactive services would be similarly situated with respect to negotiations with UMG. Our agreements with interactive services provide the best market evidence available for the rates and terms for non-interactive streaming to which willing buyers and willing sellers would agree absent a statutory license.

A. Interactive and Non-Interactive Services Can and Do "Steer" Users to Particular Content

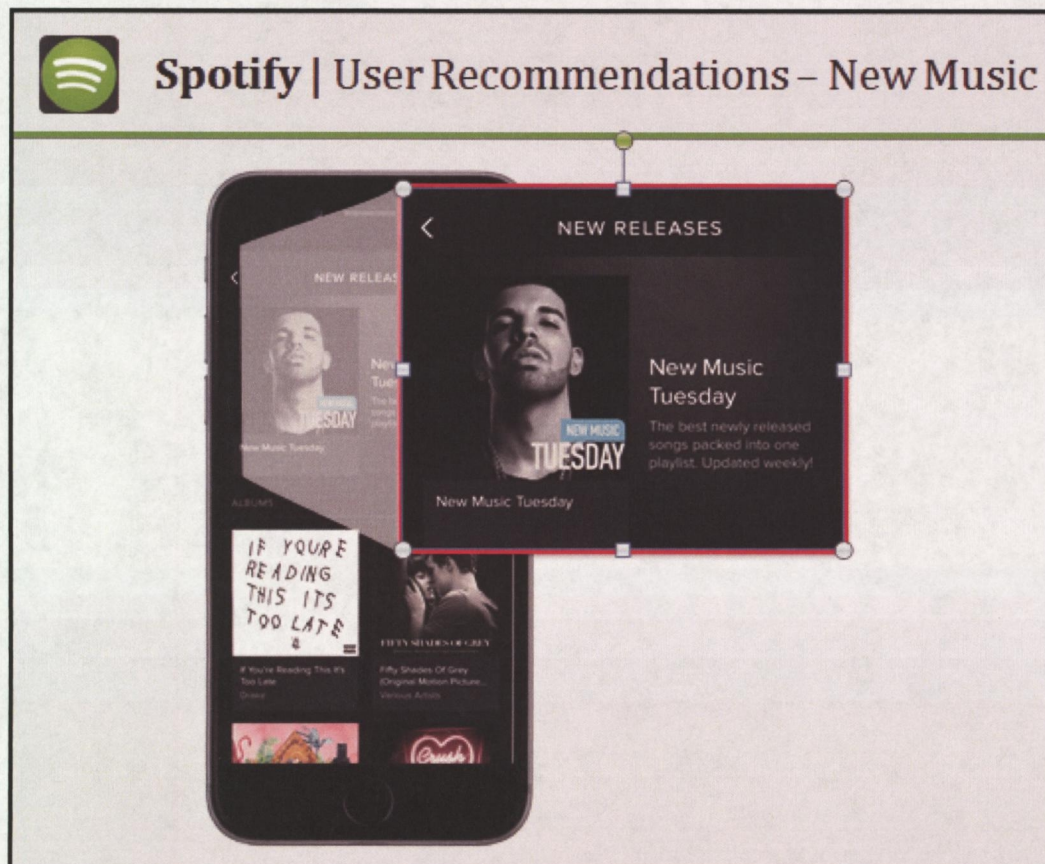
9. As noted, I understand that Profs. Shapiro, Fischel and Lichtman all assert that non-interactive services are materially different from interactive services from a negotiation perspective insofar as only the former are able to "steer" users to the content of a particular record label over the content of other record labels. The Professors are wrong.

10. Interactive services are distinct insofar as they allow users to select the specific track or the exact playlist (songs and ordering) that the user chooses, provided that the track(s) is/are among those the service offers. The market evidence, however, shows that interactive services recognize that their users want more than the ability to select the next track. They want features that editorialize, curate, and recommend the next track or playlist the user will hear. For example, the home screen of the Beats service recommends music “JUST FOR YOU” to the listener, and the home screen of the Google Play service offers a mood-based playlist recommended for the listener:



11. We have heard from our directly licensed partners that users of their subscription offerings want and are listening to service-programmed plays. For example, [REDACTED] has told us in meetings that nearly [REDACTED] of its subscription service plays are programmed streams rather than on-demand plays.

12. Interactive services engage in substantial content development to provide users with discovery tools, playlists, and non-interactive streaming options. Many interactive services used The Echo Nest as a recommendation engine until Spotify acquired The Echo Nest last year. These features are very important to us, because it is one way that services can introduce new UMG artists or tracks to users. If demand for listening to those artists and tracks increases, then so do the revenues to UMG and its artists. For example, Spotify has a “NEW RELEASES” section that features a “New Music Tuesday” playlist as well as newly released albums. It is important to UMG that our artists are featured through the NEW RELEASES section, because users accessing that section are likely to request plays by those artists and their tracks, thereby increasing our share of plays on Spotify and increasing the amount of revenue the service returns to UMG.



13. I understand that Pandora and iHeartMedia assert that, absent a statutory license, non-interactive services would use their ability to steer users to plays of particular labels as leverage in negotiations. Specifically, I understand these participants to argue that content owners such as UMG would accept rates significantly below not only the rates of interactive services, but existing statutory rates as well, in exchange for services steering more users to that owner's sound recordings. I am not aware of any evidence that supports this proposition. Based on my experience negotiating agreements on behalf of UMG, we could and would negotiate for contractual commitments that would discourage a service from steering users away from our music.¹

14. UMG has long recognized in our negotiations with interactive services that they have the ability to steer users away from UMG's music through the music they feature and recommend through the service, thereby decreasing our plays on the service and the revenue that flows to UMG and its artists. For example, UMG has observed that Rhapsody features independent labels' sound recordings in editorial space in excess of their SoundScan market share. We therefore have negotiated for protections against such steering.

15. For example, our agreement with [REDACTED] included such a term in the context of launching its programmed streaming service: [REDACTED]

[REDACTED]

[REDACTED]

¹ Prof. Shapiro noted a "tiny *gain* in advertising revenues" for steering toward UMG content. (Shapiro WDT at Appendix F, p. 9.) I do not know how big that gain is from the public version of his testimony, but Prof. Shapiro's observation suggests that UMG sound recordings benefit Pandora's revenues.

[REDACTED] (Exhibit 1.)

16. [REDACTED] agreed to a similar term which provides that [REDACTED]

[REDACTED] (This agreement is included as Exhibit 2 to my written direct testimony.)

17. These terms are very important to us and provide us with the ability to work with our directly licensed partners to ensure that our content is featured in editorial campaigns and other marketing and promotional materials. UMG devotes substantial resources to working with our partners to ensure that they feature our content to drive streams and the revenue those streams produce. Individuals at both our US distribution company (Universal Music Group Distribution, Corp.) and at the individual labels market and promote UMG releases to our interactive partners. Absent the commitments described above, UMG would risk not having its content featured at all or not having any ability to influence which artists and which content is prioritized.

18. Furthermore, if we did not have these commitments, the interactive services could effectively steer users toward other record labels' artists and sound recordings through the music they highlight. Absent the statutory license, UMG would insist on comparable protections—to

prevent discriminating against UMG, whether by featuring certain content or by a label-discriminatory algorithm—in any negotiations with non-interactive services.

19. To the extent that the ability to steer provides a service with leverage in rate negotiations, that steering and the protections that we have negotiated to mitigate the negative risk to UMG are built into UMG's agreements with interactive services.

B. Bargaining Power of Interactive Services

20. I understand that the Services have argued that the market for licenses between major recorded music companies and interactive streaming services is not workably competitive because, as they characterize it, the major record labels hold all of the bargaining power and are therefore "price-makers." In my experience with UMG, that is not true.

21. As a general matter, our negotiations with interactive services involve back-and-forth on the rates and terms of those licenses. Our negotiations last a substantial amount of time before we reach a deal. It is not unusual for a negotiation to last several months, involving many exchanges before a final agreement is executed. During this timeframe, there is give-and-take on many of the terms, including the core financial terms. Our offers and counteroffers represent financial valuations of the agreement. These are not merely negotiating positions without basis in reality.

22. Our content, of course, provides significant value to online streaming services. Indeed, without musical content, such services would not have a compelling consumer offering. However, UMG also relies on its partners, especially the ones that drive higher ARPU—such as Spotify—and we do not have the luxury to walk away from negotiations with those services whenever presented with demands that we do not like. As a result, Universal has made concessions that impact our business and ultimately forsake revenue.

23. For example, in renegotiating the [REDACTED] deal, we made many concessions, [REDACTED] and other key financial terms. I have attached as Exhibit 2 a term sheet from our renewal discussions with [REDACTED] in 2013 showing the back-and-forth and the many terms that [REDACTED] demanded. Notably, these terms show significant reduction from those that were being negotiated in advance of our initial deal with [REDACTED] in 2009, including a drop in the revenue share from [REDACTED] to [REDACTED]. (Exhibit 3.) When reviewed in light of the final agreements that we reached, it is clear that these negotiations were not one-sided.

24. Likewise, in the [REDACTED] negotiation, we ultimately conceded to [REDACTED] [REDACTED]. Attached as Exhibit 4 is an email showing the [REDACTED] UMG made to find an agreement with the [REDACTED] service.

25. In our negotiation with [REDACTED] for its [REDACTED], we made significant concessions from our typical [REDACTED] [REDACTED]. After significant give-and-take, we ultimately settled on [REDACTED] [REDACTED]. I have attached a term sheet that was exchanged as Exhibit 5.

26. In another example, negotiating with [REDACTED] for their subscription service, we conceded to lower our [REDACTED] and ultimately did not achieve the [REDACTED]. (See Exhibit 6.)

27. Yet another example of the bargaining leverage wielded by interactive streaming services is our failed negotiations with Amazon regarding their Prime music services. We ultimately did not reach an agreement on economic terms, but the service launched without streaming rights to any of UMG's repertoire. Amazon continues to offer its service without our sound recordings.

28. Finally, I understand that the Judges are interested in seeing a robust set of agreements, representing a “thick market” of evidence. I have attached as Exhibit 7 a CD containing copies of the relevant UMG and EMI agreements.

C. Hypothetical Negotiation with a Webcasting Service

29. I believe the interactive services benchmarks are the most appropriate benchmarks because they represent what a willing buyer and willing seller would agree to in the market absent the influence of the statutory license. A license for non-interactive streaming would be similar. The functionality may vary between interactive and non-interactive services (as it also does among interactive services), but from UMG’s perspective those variations would dictate only minor differences in licensing fees. The fundamental structure of the deal would remain the same.

30. In my written direct testimony, I outlined the general structure and terms that UMG aims to include in its direct deals with on-demand streaming services. I believe that absent the statutory license, our negotiations with webcasters would track our experience with on-demand services. If UMG were to negotiate with a webcaster in such a hypothetical world, it would seek the same deal structure that I explained in my written direct testimony: a greater-of compensation structure and conversion incentives designed to encourage the growth of the service’s subscription tier; advances, guarantees, and/or shortfall payments to mitigate risk; guarantees to protect UMG’s market share on the service; and other non-monetary terms that are crucial to a successful partnership.²

² I discuss these terms in my written direct testimony at pages 13-24.

31. Still in the hypothetical market, if a large commercial webcaster with a business model such as Pandora's sought to exploit UMG's repertoire, we would approach licensing in exactly the same manner as we do (and did) with [REDACTED]. Indeed, we did just that when [REDACTED]—which offered a non-interactive streaming service that I described in my written direct testimony—approached us for a direct license. We would aim to include incentives to convert to higher ARPU products, such as a subscription tier, or, in [REDACTED] case, [REDACTED]. If the webcaster chose not to convert users or agree to such a conversion funnel, we would need to be compensated with higher rates for the free tier. In sum, I believe our agreements with interactive services, adjusted for interactivity, are the most appropriate benchmarks to determine the rates to be set in this proceeding.

II. Universal's Negotiations with iHeartMedia (then, Clear Channel)

32. I understand that iHeart is relying on two term sheets that were exchanged between UMG and Clear Channel as "market" evidence that the simulcast rate should not be a "greater-of" rate structure. Because UMG ultimately did not reach an agreement with Clear Channel, I do not believe these term sheets represent market evidence.


33. Clear Channel proposed the [REDACTED] that is in the term sheets. UMG maintained that structure in the counterproposal term sheet [REDACTED]
[REDACTED]
[REDACTED].

34. The fact that Clear Channel pays the NAB per-performance rate [REDACTED]
[REDACTED] confirms that a "greater-of" rate structure would be appropriate here.

35. The term sheets should not be taken for more than what they are: very early stage negotiations that failed. UMG's incentive to continue negotiations with Clear Channel [REDACTED]
[REDACTED]. Clear
Channel was also [REDACTED]
[REDACTED]
[REDACTED]. I have attached a contemporaneous email that shows the impact
this had on continuing a negotiation that UMG likely would not have been interested in
otherwise. (Exhibit 8.)

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015



Aaron Harrison

Exhibits Sponsored By Aaron Harrison

Exhibit No.	Sponsored By	Description
SX EX. 012- RR	Aaron Harrison	Ex. 1 – [REDACTED]
SX EX. 013- RR	Aaron Harrison	Ex. 2 – [REDACTED]
SX EX. 014- RR	Aaron Harrison	Ex. 3 – [REDACTED]
SX EX. 015- RR	Aaron Harrison	Ex. 4 – [REDACTED]
SX EX. 016- RR	Aaron Harrison	Ex. 5 - [REDACTED]
SX EX. 017- RR	Aaron Harrison	Ex. 6 - [REDACTED]
SX EX. 018- RR	Aaron Harrison	Ex. 7 – CD of Agreements
SX EX. 019- RR	Aaron Harrison	Ex. 8 - Clear Channel Negotiations Recap Email

SX EX. 012 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 013 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 014 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 015 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 016 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 017 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 018 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 019 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

**DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)**

**DOCKET NO. 14-CRB-0001-WR
(2016-2020)**

WRITTEN REBUTTAL TESTIMONY OF

RON WILCOX

Executive Counsel, Business Affairs, Strategic and Digital Initiatives
Warner Music Group

PUBLIC VERSION

Witness for SoundExchange, Inc.

TESTIMONY OF RON WILCOX

BACKGROUND

My name is Ron Wilcox. I am Executive Counsel, Business Affairs, Strategic and Digital Initiatives for Warner Music Group (“Warner”). In that position, I lead the business affairs efforts for Warner’s major strategic and digital initiatives, and I work closely with Warner’s digital legal affairs lawyers and Warner’s Digital Strategy and Business Development department. Recently, I added oversight of Warner’s digital legal affairs team to my responsibilities. I am one of the Warner attorneys primarily responsible for developing Warner’s relationships and negotiating agreements with digital music services, including agreements that authorize the transmission of Warner’s labels’ repertoire through streaming services. I previously submitted written direct testimony in this proceeding. My background and qualifications are set forth in my written direct testimony.

I submit this rebuttal testimony to respond to the amended written direct testimony submitted by Profs. Fischel and Lichtman, filed January 13, 2015 (hereinafter, “Fischel-Lichtman”), which analyzes and derives a rate recommendation from Warner’s agreement with iHeartMedia (“iHeart”).¹ I also respond to the written direct testimony of Simon Fleming-Wood and Bob Pittman, both filed October 7, 2014 (“Fleming-Wood” and “Pittman,” respectively) and to the redacted written direct testimony of Prof. Carl Shapiro and Prof. Michael Katz also filed on October 7, 2014 (“Shapiro” and “Katz,” respectively).

¹ Fishel-Lichtman’s analysis is based on the Warner-iHeart agreement entered into as of October 1, 2013. As I explained in my written direct testimony, Warner and iHeart entered into an amendment to that agreement as of March 31, 2014. Except where my rebuttal testimony specifically discusses this amendment, references to the agreement herein are to the original agreement.

DISCUSSION

I. The Fischel-Lichtman Analysis Concerning the Warner-iHeart Agreement is Wrong.

1. I have reviewed a specially redacted version of the Fischel-Lichtman analysis. Specifically, I have reviewed a version of the Fischel-Lichtman analysis that includes unredacted information concerning the Warner-iHeart agreement that iHeart filed with a “restricted” designation. (Fischel-Lichtman, at ¶¶ 32-56 and Exhibits A-B.) I have not seen and I have no information regarding the “restricted” portions of the Fischel-Lichtman analysis that concern confidential information of any entity other than Warner.

2. Fischel-Lichtman assert that the Warner-iHeart agreement is marketplace evidence that, absent the statutory license, a willing buyer and willing seller would agree to a rate of \$0.0005 per performance for a non-simulcast radio service containing all of the functionality offered by iHeart’s personalized or customized radio service. That assertion is absurd. Fischel-Lichtman’s analysis is based on incorrect and misleading assumptions and conclusions regarding the Warner-iHeart agreement, the parties’ negotiations, and Warner’s modeling.

A. Fischel-Lichtman Misdescribe the Warner-iHeart Agreement and Their Analysis Has No Basis in the Actual Negotiations.

3. Fischel-Lichtman base their analysis on the notion that “the Warner agreement reflects a bundle of two distinct sets of rights”: one “bundle” purportedly for iHeart to have the right “to play the same number of Warner performances as it would have played absent the agreement” on its non-simulcast radio service; and a second “bundle” purportedly for iHeart to have the right to perform Warner sound recordings on such service above and beyond the first “bundle.” (Fischel-Lichtman, at ¶ 45.) Fischel-Lichtman contend that, absent the direct agreement, Warner’s share of performances on iHeart’s non-simulcast radio service would be equivalent to [REDACTED] (“Warner’s Pre-Agreement

Share”), [REDACTED]² (*See id.*, at ¶¶ 19, 36.) The additional performances in Fischel-Lichtman’s second “bundle” equal the difference between [REDACTED]
[REDACTED]].⁴ Based on this “bundle of two distinct sets of rights” construct, Fischel-Lichtman assert that the Judges should simply disregard the amount of compensation iHeart agreed to pay for the first purported “bundle”—performances of Warner sound recordings up to Warner’s Pre-Agreement Share. (*Id.*, at ¶ 46.) Fischel-Lichtman then opine that the true willing buyer/willing seller negotiation between iHeart and Warner was for the second purported “bundle”—performances in excess of Warner’s Pre-Agreement Share. (*Id.*, at ¶ 49.) Relying on projections that [REDACTED]
[REDACTED], Fischel-Lichtman assert that the value of this second “bundle” is \$0.0005 per performance. (*Id.*, at ¶¶ 40, 51.)

4. Fischel-Lichtman have not accurately analyzed the agreement that Warner and iHeart executed or our negotiations with iHeart. Warner and iHeart never discussed a license

² During our negotiations, [REDACTED]

³ Under the agreement, [REDACTED]

⁴ Notably, under the agreement, and contrary to Fischel-Lichtman's allegations, [REDACTED]

using the “bundles” construct used in the Fischel-Lichtman analysis; Warner did not model the agreement under that construct; and, most importantly, the agreement does not embody any such construct.

5. As I previously explained in my written direct testimony, [REDACTED]
[REDACTED] These are not, however, the
bundles used in the Fischel-Lichtman analysis. The agreement describes [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (attached as Exhibit 1
to my written direct testimony).

6. [REDACTED] is for iHeart’s
personalized or customized, non-simulcast radio service. In exchange for these rights, iHeart
agreed to pay [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵ [REDACTED] (See Fischel-Lichtman, at ¶ 38.)

[illegible]

	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[illegible]

11. By way of example, assume that iHeart's non-simulcast radio service streamed five billion total performances in a particular month in the first full calendar year of the agreement (2014), and that Warner sound recordings accounted for 20% of those royalty-bearing

performances (one billion). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Sticking with the same assumptions, iHeart could reduce the total effective performance rate paid to Warner below the NAB rate of \$0.0023, but only by performing Warner sound recordings [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12. The actual economics of the Warner-iHeart agreement thus completely debunk the Fischel-Lichtman analysis. As demonstrated, [REDACTED]

[REDACTED]

[REDACTED] That is completely contrary to Fischel-Lichtman's theory that their first purported "bundle" [REDACTED]

6 [REDACTED]

[REDACTED]

[REDACTED] may be disregarded because the parties would never agree to value performances within that "bundle" at any rate other than the statutory rate. (Fischel-Lichtman, at ¶¶ 46-47.)

13. Likewise, Fischel-Lichtman's theory that Warner and iHeart valued the performances in their second purported "bundle" [REDACTED]

[REDACTED] at \$0.0005 is demonstrably false. *In all cases*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. At no time during our negotiations did iHeart ever claim, or provide to Warner, any modeling, that showed iHeart valuing the agreement as in the Fischel-Lichtman analysis.

15. At no time did Warner model the potential agreement with iHeart as in the Fischel-Lichtman analysis. Attached as Exhibit 4 are several of our models of the potential agreement. To provide context [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16. None of the Warner models utilize the Fischel-Lichtman two “bundle” construct. The Warner models instead [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Fischel-Lichtman Pick and Choose Assumptions.

17. Fischel-Lichtman also make key errors in their analysis and omit inconvenient particulars that impact the result, even if their model were to have some basis in fact.

18. *First*, as I have noted, Fischel-Lichtman base their analysis on the assumption that, absent the direct agreement, iHeart would have performed Warner’s sound recordings at Warner’s Pre-Agreement Share [REDACTED]⁷ (See Fischel-Lichtman, at ¶ 19.) Fischel-Lichtman assert that iHeart “would have continued to play [Warner’s] music at this baseline level and would have paid for those performances at the statutory rate.” (*Id.*) Fischel-Lichtman’s assumption [REDACTED] e

⁷ As noted, [REDACTED]
[REDACTED]

[REDACTED]

19. For the Fischel-Lichtman analysis to have any basis in fact, it must account for

[REDACTED] Again, the Fischel-Lichtman
“bundles” are specious. But Fischel-Lichtman’s analysis fails even on its own terms, not only
for all of the reasons described above and below, but also because it does not account for

[REDACTED]

20. *Second*, Fischel-Lichtman’s assumption of [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]

21. **Third**, Fischel-Lichtman model Warner's [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

C. Fischel-Lichtman's Analysis Fails to Value Multiple Protections that Warner Received under the Agreement.

22. Fischel-Lichtman disregard that the agreement [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (Fischel-
Lichtman, at ¶ 34.) Regardless [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] I have discussed this and other important [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] in my written direct testimony.

23. Fischel-Lichtman make no attempt to determine the value of these protections.
They instead either do not discuss these numerous protections or surmise that their value could

“overstate” or “understate” the \$0.0005 Fischel-Lichtman rate. As already demonstrated, the \$0.0005 rate that Fischel-Lichtman put forth is simply wrong: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For example:

- [REDACTED]

- [REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

24. Finally, I understand that Fischel-Lichtman contend that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. Response to Fleming-Wood's and Pittman's Assertion that Webcasters Do Not Compete with Interactive Services.

25. I understand that the Services participating in this proceeding contend that "non-interactive" services are fundamentally different from interactive services. Mr. Fleming-Wood and Mr. Pittman claim that non-interactive services compete primarily with terrestrial radio and do not compete in the market with "interactive" services, such as Spotify. (Fleming-Wood, at 6-8; Pittman, at 6.) I do not agree with these witnesses' view that non-interactive and interactive services compete in different markets. As explained in my written direct testimony, *all* digital streaming services have fundamentally changed how the recorded music industry distributes music. Non-interactive services include functionality that customizes and personalizes the user experience, so as to approach the experience of interactive. Interactive services, on the other hand, have increased their editorial, curation and playlist functionality to provide listeners with more of the "lean back" experience historically associated with non-interactive services. In short, the line between the two types of services is more blurry than bright, and it is not accurate to say they operate in different markets.

26. Mr. Pittman's views, in particular, are inconsistent [REDACTED]

[REDACTED]

[REDACTED] As noted in my written direct testimony, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

27. The fact that iHeart requested [REDACTED]

[REDACTED]

[REDACTED] (Exhibit 7.) [REDACTED]

III. Response to Shapiro's and Katz's Claims that Warner Exerts Monopolistic Power.

28. I understand that Prof. Shapiro and Prof. Katz argue that the market for licenses between major recorded music companies and interactive streaming services is not sufficiently competitive because, as they characterize it, the major record labels hold all of the bargaining power. For Warner, this is far from true. Our negotiations with interactive streaming services with respect to economic terms and functionality are hard fought and take place over many months and sometimes more than a year. This back-and-forth is not a superfluous exercise in which Warner ultimately dictates the price. Rather, as evident from our actual negotiations, it involves give-and-take on both sides. Services, of course, range in their negotiating power from

large multifaceted companies that can both make offers and exert pressures beyond the bounds of the particular agreement being negotiated (for example, AT&T, Apple, Google) to smaller startups or companies with a niche product. Regardless, the negotiations are meaningful and our agreements always reflect that give-and-take.

29. For example, in our negotiation with [REDACTED]
[REDACTED]
[REDACTED] I have attached as Exhibit 8 an
early term sheet [REDACTED]
[REDACTED]
The agreements show, however, [REDACTED]
[REDACTED]

30. Another example of an interactive service that has exerted considerable leverage because [REDACTED]
[REDACTED]
[REDACTED] (Exhibits 9-10.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Exhibit 11, at 3.)

31. While not an interactive streaming service example, when Google Play first launched, Google offered a download store. To make Warner sound recordings available in the download store, Google needed rights from Warner. Initially, we could not reach an agreement for those rights. Despite not having Warner sound recordings available in its download store, Google Play launched in 2011. We eventually reached an agreement in 2012 to make Warner

sound recordings available in Google's download store in conjunction with the launch of the Google Play streaming service.

32. Finally, I have attached as Exhibit 12 a CD containing copies of numerous relevant Warner agreements with interactive services. I understand that the Judges are interested in seeing a substantial number of agreements, representing a "thick market" of evidence. These agreements make it clear that Warner negotiates for a range of rates and terms across the interactive services. Warner is not a price-maker, and it does not exert monopoly-like power.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015

A handwritten signature in cursive script, appearing to read "Ron Wilcox", written over a horizontal line.

Ron Wilcox

Exhibits Sponsored by Ron Wilcox

Exhibit No.	Sponsored By	Description
SX EX. 020- RR	Ron Wilcox	Ex.1 - [REDACTED]
SX EX. 021- RR	Ron Wilcox	Ex. 2 - [REDACTED]
SX EX. 022- RR	Ron Wilcox	Ex. 3 - [REDACTED]
SX EX. 023- RR	Ron Wilcox	Ex. 4 - [REDACTED]
SX EX. 024- RR	Ron Wilcox	Ex. 5 - [REDACTED]
SX EX. 025- RR	Ron Wilcox	Ex. 6 - [REDACTED]
SX EX. 026- RR	Ron Wilcox	Ex. 7 - [REDACTED]
SX EX. 027- RR	Ron Wilcox	Ex. 8 - [REDACTED]
SX EX. 028- RR	Ron Wilcox	Ex. 9 - [REDACTED]
SX EX. 029- RR	Ron Wilcox	Ex. 10 - [REDACTED]
SX EX. 030- RR	Ron Wilcox	Ex. 11 - [REDACTED]
SX EX. 031- RR	Ron Wilcox	Ex. 12 - CD of Agreements

SX EX. 020 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 021 -RR

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Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 022 -RR

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Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 023 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 024 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 025 -RR

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SX EX. 027 -RR

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Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 028 -RR

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Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 029 -RR

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SX EX. 030 -RR

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SX EX. 031 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

TESTIMONY OF CHARLIE LEXTON

Introduction

1. My name is Charlie Lexton. I am the Head of Business Affairs and General Counsel at the Music and Entertainment Rights Licensing Independent Network, which is more commonly known as "Merlin." I have been at Merlin since January 2008, and assumed my present role in April 2008, but I have been working in the music industry for almost my entire professional career, spanning more than twenty years. I was one of the two people at Merlin primarily responsible for the negotiation of our recent licence with Pandora. I have attached a copy of the Pandora-Merlin licence as Exhibit 1 and will refer to it throughout my testimony.

2. I have reviewed the public versions of Pandora's testimony, including Pandora's rate proposal and the testimony of Mike Herring and Dr. Carl Shapiro. I am aware that Pandora has suggested that our licence supports a proposal for a per-performance royalty rate that is *below* even the statutory rates that Pandora pays outside of our licence and the minimum rate Pandora must pay under our licence. That is simply incorrect. I am also aware that iHeartMedia has now suggested our licence supports a per-performance rate that is similar to or lower than \$0.0002 per performance. That is grossly incorrect.

3. From what I can discern, Pandora has made a number of statements that fundamentally misrepresent our agreement, because when I take all relevant facets of the deal into account, I cannot see how any reasonable calculation could support Pandora's rate proposal. Having negotiated the deal, I worry that Pandora has presented the licence as a series of distinct terms as opposed to a homogenous agreement where every term is interrelated and would not have been agreed absent the other terms. The latter is the better way to understand the licence and is the view I will present here. In particular, after providing appropriate background

information, I will explain: (a) how the direct licence was inextricably affected by, and would not have been agreed on its terms but for, the nature and terms of the existing compulsory licence; (b) how the direct licence in this instance offered unique consideration that is not provided under the statutory licence; (c) how the effective compensation under our direct licence is no lower than the compensation record labels would have received from Pandora under the statutory licence; and (d) how the terms, and implementation, of this experimental licence make it impossible to assess the actual value of the licence at this point.

4. In short, we knew (and Pandora knew) that it was going to pay the Pureplay statutory rates if we did not agree to a licence. Our choice was simple. For the approximately 18-month period in which the Pureplay settlement was still in effect and available to Pandora, we could either (a) leave our members to operate under those rates as Pandora has the right to and chooses to elect them under the statutory licence regime in the U.S.; or (b) try to obtain as much value as we could for our members that Pandora otherwise would not provide. We chose the latter, recognising however, that we were operating outside of our usual negotiating position in the market (where if we “walk away” from a negotiation, the counterparty is left unlicensed) and that such a licence could only be negotiated within the confines of Pandora’s option to rely on the statutory licence. As a result, the rates we negotiated were agreed as a [REDACTED] of the statutory rates rather than as independently negotiated rates. We also negotiated the licence under the self-imposed remit that we were to avoid in any way undermining the statutory licence regime or otherwise passing comment on what an acceptable level may be for future statutory rates, hence our position that the [REDACTED] [REDACTED].] Attached as Exhibit 2 is an email chain showing Merlin’s remit with respect to this licence.

5. From this vantage point, we were surprised to learn that Pandora held out our licence as the best example of what the market would and should pay for use of a sound recording. It is not that. Our licence was simply an opportunity to generate additional [REDACTED] [REDACTED] when we knew any negotiation would be firmly anchored by the rates Pandora could elect to pay with no negotiation at all. In my view, this licence was therefore directly affected and inextricably bound by the existing statutory rates, not evidence of what the next statutory rates should be.

Background

6. I have worked in the music industry for virtually all of my career, spanning over twenty years now. Immediately after finishing university in 1989, I was self-employed working in music management and production. During, and after completing, my education at the College of Law in the United Kingdom from 1992 to 1994, I served as a Director of a brand new independent record label, Dorado Records Limited, that mixed soul, hip hop, jazz and dance music. I then trained and qualified as a Solicitor in the Media and Communications Department at the law firm DJ Freeman based in London where I worked from 1995 until the end of 1999. While at DJ Freeman, among other things, I continued my legal work for Dorado Records.

7. In 2000, I joined Universal Music International as Director, Legal and Business Affairs reporting to the General Counsel on a variety of record company matters, including intra-group licensing, artist agreements and label deals. I became Vice President of Business Affairs at EMI Music in June 2002. In that role, I was the head of business affairs for Continental Europe, Africa, and the Middle East. In that position, I worked on a variety of different matters including online and mobile digital distribution agreements, which at that time were largely with leading European telco operators and service providers.

8. I left EMI in the middle of 2005 and became a Director and Co-Owner of City Rockers, which was an independent record label and an artist management company. We worked with several exciting and innovative artists, but principally The Sunshine Underground in relation to whom we had a joint venture arrangement with Sony Music in the UK. I also continued to serve as a legal and business affairs consultant to a number of record labels (including EMI UK), often on digital content agreements.

9. It was in January 2008 that I started as a consultant to Merlin, which rapidly led to my employment, as from April 2008, running the organisation's legal and business affairs. In that capacity, I have a variety of responsibilities including management of our corporate framework, oversight of our legal advisers in a variety of jurisdictions, the running of our infringement action settlement negotiations, but most relevant here, alongside our CEO, I negotiate and manage Merlin's most important licences with digital music services.

Introduction to Merlin

10. Merlin is a global rights agency for the independent record label sector. The official formation of Merlin was announced in January 2007, and the organisation opened for membership in early 2008. As of February 2015, Merlin has approximately [REDACTED] label and distributor members, who, in turn, represent over 20,000 labels in 40 countries. In our first nearly seven years of operation, Merlin has been able to negotiate direct licences in territories around the world, including with prominent digital music services like Spotify, Rdio, Google Play, Beats Music, and more recently, Pandora.

11. Broadly speaking, Merlin's purpose is to allow independent record companies to benefit from direct deals negotiated by Merlin on a collective basis. As such, Merlin is a one-stop-shop for recorded music rights licensing. It represents recorded music rights owned and/or

controlled by independent record labels and distributors who are eligible and choose to join Merlin. These are our members.

12. Merlin's core remit is to represent its members in negotiating licences with digital music services in the hope of overcoming market fragmentation issues that have historically challenged the independent music sector (particularly in the digital domain). This licensing activity only relates to non-physical exploitation rights in sound recordings, and generally does not cover a la carte download-only services such as the iTunes Store. Merlin is not involved in dealing in music publishing rights or active in music publishing.

13. Merlin also represents its members in pursuing and, where appropriate, settling claims against parties who infringe the copyrights of its members. While I understand this proceeding is about licensing and not infringement actions, this is important in order to understand the way we structure Merlin's membership. Generally speaking, our members fall into two basic categories: (a) those who allow Merlin both to represent their rights in the negotiation of non-exclusive licences *and* pursue and, where appropriate, settle copyright infringement actions; and (b) those who only permit Merlin to pursue and, where appropriate, settle infringement actions on their behalf. Approximately [REDACTED] of Merlin members fall into the first category, meaning that Merlin has the ability to negotiate licences with digital services for about [REDACTED] record label and distributor members. [REDACTED] [REDACTED] – meaning members for whose rights we can negotiate a licence, on a non-exclusive basis, with a digital music service. [REDACTED] members range from individual labels and label groups to distributors and aggregators who may represent thousands of labels.

14. Merlin serves the independent recorded music sector. Membership is only open to businesses which own or control rights in master recordings and which have an annual share of

the global market for recorded music that is *less* than 5%. This restriction also applies to a case in which a record company is owned in whole or in part by a company with more than a 5% share of the global recorded music market. Therefore, not every recorded music company can become a Merlin member, but many can.

15. Importantly, all of the rights Merlin licences are non-exclusive, and each Merlin member also retains the right to “opt in” or “opt out” of each individual agreement, legal action, or settlement that Merlin enters. So, in practice, after Merlin has negotiated a licence, it generally sends a notice to its applicable members summarising the economic and other terms of the agreement and offering them the opportunity not to include their rights in such licence (we refer to this notice as a “Deal Notice”). Therefore, at the time we negotiate a licence with a digital music service, we cannot, as a rule, guarantee to the service that it will receive the rights to perform the repertoire of all of our members or of any of our members in particular. I have attached a sample Deal Notice for our Pandora-Merlin licence as Exhibit 3.

16. As a general matter, we estimate that if you include all of our [REDACTED] members (including the labels distributed by our distributor members), Merlin members own and/or control the rights to roughly 10% of the streaming sector of the global recorded music market. This is not a precise number, but is our general sense based on the royalty reporting we see from various of the services with whom we are in business. From deal to deal, our share may fluctuate in some part because services sometimes differ in audience preferences, consumer offering, and/or geographical footprints. More importantly, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. Even when we can identify the [REDACTED] members that have opted into a Merlin licence, that does not necessarily enable us to estimate the actual share of the market that the service has licensed. This is because some of our [REDACTED] members are distributors. Distributors work to secure opportunities for their clients – music labels or sometimes individual artists – to have their music heard. But, like Merlin, distributors sometimes have opt-out or opt-in policies for their own clients, meaning that there are two different decision points – at the label-distributor level and at the distributor-Merlin level – to opt sound recordings out of the licences we negotiate.

18. The consequence of all of this is that while we are confident that our Category 1 membership in sum total represents approximately 10% of the streaming sector of the global recorded music market, on any particular service, [REDACTED]
[REDACTED] are such that in the weeks before I submitted this testimony, we have been working with our members and Pandora on [REDACTED]
[REDACTED] This is notable, especially since there are only roughly [REDACTED] left on the deal.

Context of Negotiations for the Pandora-Merlin Licence

19. I have been at Merlin since 2008 when we opened for membership and commenced licensing operations. In that time, I have been involved in negotiating and managing all of our high-value, high-profile licensing transactions. As I mentioned above, this includes the negotiation of the Merlin licence with Pandora, an endeavour that was led on the Merlin side by Charles Caldas, Merlin's Chief Executive Officer, and myself.

20. The negotiation began in [REDACTED] with a presentation led by Pandora's ex-CEO and President Joe Kennedy and Vice President of Business Affairs and Assistant General Counsel, Chris Harrison. That presentation is attached as Exhibit 4. Pandora told us that their vision was that [REDACTED] of all internet radio performances in the US would be from independent labels. Pandora's pitch to us was that a direct licence would result in [REDACTED]

21. With respect to [REDACTED], Pandora identified several features of their service that they would give us access to [REDACTED]. For instance, they promised us [REDACTED]

[REDACTED] They offered to give us access to [REDACTED] of a label's performance. [REDACTED]

[REDACTED]. As far as we knew, none of this was available to our members under the statutory licence with Pandora and, at the very least, Pandora certainly was not offering it without a direct licence. [REDACTED]

[REDACTED] But they noted we would need to [REDACTED] to enable this feature. [REDACTED]

This feature was part of [REDACTED] and ultimately became part of the [REDACTED]

22. With respect to [REDACTED], Pandora suggested they could [REDACTED] [REDACTED]. (Exhibit 4, at 7.) I also understood Pandora to have proposed [REDACTED]

[REDACTED] from the rate owed.

23. Finally, Pandora suggested in this initial proposal that the deal would result in [REDACTED]. To support this suggestion, Pandora started by identifying [REDACTED]. Based on these rates, Pandora suggested we might be able to [REDACTED] and, in return, Pandora would [REDACTED]. All of these points were not just made to us in person but reflected in the presentation Pandora sent to us. (Exhibit 4.) They also said that they had [REDACTED]

24. While the licence's specific terms [REDACTED] between that presentation and the execution of the deal, the core concept was in place: [REDACTED]

25. Merlin is very supportive of a strong statutory royalty rate for webcasting services. As a result, we were conscious at all times to try to ensure that and intended that the agreement would not affect this Copyright Royalty Board proceeding. We thought that [REDACTED], it would be clear that this was just an example of a direct licence on terms agreed *because of* the existing statutory

rates. Due to the fact Pandora offered us [REDACTED]
[REDACTED], we understood this as an opportunity for experimentation given and within the constraints imposed by Pandora's existing statutory rates. This point was stated well by our CEO, Charles Caldas, in announcing the licence, when he said, "For the thousands of labels Merlin represents, this agreement with Pandora provides a real best of both worlds scenario: a hugely important opportunity to increase our members' revenues and access unparalleled opportunities for exposure, *whilst continuing to support a collective licensing framework.*"¹ (Exhibit 5, emphasis added.)

26. I would emphasise, this was a very unusual negotiation for us. In my time at the Merlin organisation, the only other instance I recall where a similar dynamic has inhibited a true market negotiation was with [REDACTED]

[REDACTED]. The parallel in both cases – and even more so in Pandora – [REDACTED]

[REDACTED] Both we and Pandora therefore knew that the negotiation both started at [REDACTED]

[REDACTED]. Unlike negotiations with services that do not operate under the statutory licence, we knew Pandora could walk away at any point and still use our content under the compulsory licence. Not only could Pandora walk away, Pandora knew the exact price of walking away, as they would merely have to pay the statutory rate they were already paying. As

¹ Merlin Press Release, August 6, 2014, *available at* <http://www.merlinnetwork.org/news/post/merlin-and-pandora-partner-to-help-independent-labels-and-artists-grow-their>

such, we could not withhold our content or negotiate for headline royalty rates above the statutory rates.

The Pandora-Merlin Licence Was Directly Related to and Intertwined With the Existing Statutory Rates

27. Our licence with Pandora was an exercise in experimenting with direct licensing derived from the existing statutory rates. The features of the licence itself plainly reflect that in a number of ways.

28. First, the term of the licence is set to end on [REDACTED]
[REDACTED]. The term begins on [REDACTED] and, importantly,
ends on [REDACTED]. (Exhibit 1, at ¶ 1(r).) [REDACTED]
[REDACTED]. In fact, the term can
only be extended by [REDACTED]
[REDACTED]
[REDACTED] about continuing forward with this experimental
arrangement.

29. Second, the reference point on royalty rates in the negotiations [REDACTED]
[REDACTED]. In fact, the stated royalty rates in the licence are
[REDACTED]
[REDACTED]. (Exhibit 1, at § 3(a).) This is no accident. The reference point in
the Pandora proposal to us was [REDACTED], and therefore I
looked up those statutory rates. [REDACTED]
[REDACTED], but upon research, I learned that under their existing statutory rates,
Pandora pays a separate, higher rate to subscribers. [REDACTED], as
shown in the email I have attached as Exhibit 6. We then insisted that the stated rates in our

direct licence reflect [REDACTED]
[REDACTED], which is memorialized in the licence itself.

30. The [REDACTED] also mirrors Pandora's alternative under statutory rates. Because Pandora is subject to a [REDACTED]
[REDACTED]
[REDACTED]. (Exhibit 1, at § 3(a)(i).) We understand that under the existing statutory rates, Pandora is subject to a percentage-of-revenue calculation that reaches all of their revenue. The direct licence [REDACTED]
[REDACTED]. If we were going to make a similar direct licence with another statutory webcaster, all things being equal, we would insist on [REDACTED]
[REDACTED].

31. Third, the licence specifies that [REDACTED]
[REDACTED]
[REDACTED]
(Exhibit 1, at § 15(b).) The purpose of this provision is self-evident: the [REDACTED]
[REDACTED] is dependent on Pandora eligibility for the Pureplay rates. If Pandora could no longer (or did not) elect the existing Pureplay rates, Merlin needed [REDACTED] because the foundation of our evaluation of the licence [REDACTED]. As I have said earlier, the rate we agreed to was a [REDACTED]
[REDACTED]. I also viewed this [REDACTED]
[REDACTED] as a protection against the theoretical possibility of Pandora [REDACTED]
[REDACTED]

[REDACTED] – i.e., I wanted to protect against the possibility of this agreement [REDACTED]

[REDACTED]

[REDACTED]. My calculation here was that [REDACTED]

[REDACTED]

[REDACTED]. As this [REDACTED] provision demonstrates, I can say unequivocally that we did not regard this as a deal we would have done on these terms in the absence of Pandora having the benefit of the existing Pureplay statutory rates.

32. Fourth, the licence makes royalty rates for

[REDACTED]. The licence expressly defines [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Our licence with Pandora, through these provisions, is built to [REDACTED]

[REDACTED], which acknowledges that [REDACTED]

[REDACTED].

33. Finally, [REDACTED] under the licence are calculated with reference

[REDACTED]. The [REDACTED]
[REDACTED]
[REDACTED], and the [REDACTED]

[REDACTED] were intended to ensure that [REDACTED]
 [REDACTED]
 (The [REDACTED] the annual increases in the statutory rates for each of 2014 and 2015). (Exhibit 1, at §5(a).)

The Licence Reflects Considerations That Are Unavailable Under the Compulsory Regime

34. The direct licence was tied in many material respects to Pandora's existing statutory rates, but much of the consideration that Merlin labels received under the direct licence was either unavailable or not offered while Pandora was operating under statutory rates. Such consideration includes:

35. Steering: Pandora's promise to overindex Merlin labels, [REDACTED]
 [REDACTED], is not a benefit that was available to our labels when Pandora operated under the statutory licence. This is because, by definition, Pandora cannot steer towards all copyright owners at once ([REDACTED]
 [REDACTED]). This is due to the fact that Pandora can only deliver a finite number of plays (i.e., the number of plays to make up total listening hours at any one time) and therefore for every label whose recordings are performed in excess of its "natural performance rate" [REDACTED]
 [REDACTED] another label's recordings must be performed at a frequency below the label's natural performance rate. Consequently, I understood steering as a benefit that would only be available under a direct licence and which could only be available to a limited number of recipients (since, as a matter of logic, it is not possible for Pandora to overindex spins for all record labels). Furthermore, I understood that Pandora believed there was a limit to the extent it could adjust its play-listing algorithm to

deviate from the natural performance rate without negatively impacting its consumers' experience – and it was of great importance to Pandora to avoid such an outcome.

36. Steering is a particularly important benefit *because* it cannot be replicated across the market. Only so many direct licencees can receive the economic benefit of guaranteed steering before it becomes infeasible. By being the first of these direct licencees this therefore allowed us to have a preferential position on the service. In my experience, independent record companies are rarely, in fact almost never, given such an opportunity on a digital music service, especially as compared to major record companies. Thus, we regarded steering as a benefit that was uniquely beneficial for our members as part of a direct licence.

37. Bullets: Under the direct licence, Merlin labels have the ability to designate [REDACTED] that would otherwise be applicable. (Exhibit 1, at § 1(c).) Merlin, however, had to [REDACTED] to enable this functionality. (Exhibit 1, at §§ 1(c)(v), 1(m).) Pandora made clear to us that [REDACTED]. Attached as Exhibit 7 is an email from Chris Harrison of Pandora to me explaining that Bullets are not part of Pandora's service.

38. Importantly, the choice to designate a Bullet or not is [REDACTED]. In essence, the "Bullet" is a recognition that record companies can determine when there are special circumstances that are worthwhile to deviate from their normal per-performance royalty rate, much like services and record companies are free to enter into direct licences. Furthermore, and

in any event, given that [REDACTED]
[REDACTED], this ensured that [REDACTED]
[REDACTED].]

39. Pandora Presents and Pandora Premieres: Merlin labels received [REDACTED]
[REDACTED] to these programs. (Exhibit 1, at § 11.) My understanding is that Pandora Presents is a live concert program and Pandora Premieres involves the streaming of whole albums, and neither of these programs is paid for under Pandora's statutory rates, i.e., Pandora directly licences participation in those programs

40. Data: Pandora committed to give Merlin labels access to metrics about its listener usage for their artists. (Exhibit 1, at § 9.) To my knowledge, that is not required by the statutory licence.

41. Artist/Label Outreach: The direct licence provides Merlin members with access to [REDACTED]
[REDACTED] (Exhibit 1, at §§ 7, 8, 10.) Each of these commercial opportunities is not part of the consideration our members receive under the statutory licence.

42. Discounted Advertising: The licence includes an offer for Merlin members to purchase display-only advertising at a [REDACTED] discount. (Exhibit 1, at § 6.) For our members, many of whom have limited advertising budgets, such a discount could translate into real dollars saved, and was not available under the statutory licence.

43. Each of these offerings could provide value to our members and, as far as I know, are either unavailable under the statutory licence or were not offered to our members regularly

before the direct licence. This demonstrates that our direct licence with Pandora provided considerable value that could not be replicated by the statutory licence.

44. A further benefit of the licence was a provision under which, [REDACTED]

[REDACTED]] (Exhibit 1, at ¶ 13.) [REDACTED]

45. Also, one motivation for the licence that was unique and particular to Merlin was that we viewed a direct licence with Pandora as a possible way [REDACTED]

The Effective Compensation Is, At Worst, No Lower Than Compensation Under the Existing Statutory Rates Paid By Pandora

46. This licence is structured explicitly to protect the mechanisms of collective licensing and to preserve both the value of our members' rights and the performers that they represent and not to pass comment on the rate for webcasting other than to acknowledge that

Pandora is operating under the Pureplay rates in 2014 and 2015. Indeed, I would describe the licence far less in terms of actual rate numbers but more as a [REDACTED] of the existing statutory rates.

47. It is important to note that Pandora initially proposed [REDACTED]
[REDACTED] whereas the agreement we actually negotiated created a structure whereby [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

48. It should also be noted that because the [REDACTED]
[REDACTED], the consequence of the [REDACTED] is that in order to achieve the maximum benefit available to it under the direct agreement, Pandora would need to overweight spins for *each and every* Merlin member participating in the agreement by at least [REDACTED] (Therefore, in terms of achieving the maximum discount, overweighting one label's plays by [REDACTED] does not balance out a failure to overweight another label.)

49. I recall that on the day the licence was announced, Pandora's CEO stated in *Billboard* magazine that Pandora doesn't "expect the deal to have a major impact on costs."² In fact, in the same article, our CEO Charles Caldas stated that the terms are no worse than the

² <http://www.billboard.com/biz/articles/news/digital-and-mobile/6207066/pandora-signs-first-direct-label-deal-with-merlin>

statutory rates previously received and added – which is true – “We wouldn’t do any deal where there was any risk we were going to get paid less.”

50. I understand that Pandora is proposing statutory royalty rates as low as \$0.00110 for ad-supported performances and \$0.00215 for subscription performances. I also understand that iHeartMedia has suggested that the rates implied by our direct licence are as low as \$0.0002. While much of their economic analysis is redacted and unavailable to me, given the actual terms of the direct licence, I fail to see how that is possible.

51. A proper evaluation of our direct licence would have to recognise that its terms are interconnected and ensure that effective compensation will, at minimum, be no worse under our agreement than it is under Pandora’s statutory rates.

52. In this regard, and most obviously, the [REDACTED] both Pandora’s and iHeartMedia’s proposed rates and [REDACTED]. For the rates implied by our direct licence to move downward from those [REDACTED] rates, Pandora [REDACTED], which, as I noted above, would be impossible as services cannot steer toward all record companies at once. (Furthermore, all the other terms in our agreement would need to be disregarded.) Even if, for argument’s sake, a service could [REDACTED]
[REDACTED]
[REDACTED]. (Exhibit 1, at § 4(b).) These rates, of course, are higher than the per-performance rates suggested by Pandora and considerably higher than the per-performance rates proposed by iHeartMedia. Put another way, the direct licence [REDACTED]
[REDACTED] It is also notable that the stated rates in the

direct licence [REDACTED]. It would not make sense, then, that the licence would imply statutory rates in 2016 that are [REDACTED].

53. There are also at least four important additional and incremental sources of consideration that are necessary to understand the value of the direct licence. *First*, the Pandora and iHeartMedia rate proposals seem to entirely omit one key source of consideration: our direct licence includes a [REDACTED]. (Exhibit 1, at § 3(e).) This is a source of possible consideration that was *in addition to* what was offered by the statutory rates. Any statutory rate proposal based upon our direct licence would necessarily need to include a similar [REDACTED]. The inclusion of this provision further confirms that the direct licence is intended to create *additional* compensation for Merlin members. Moreover, if Pandora is correct that [REDACTED]. This was an extremely important facet of the deal for us because it preserved our ability to [REDACTED]. In fact, I do not believe we would have agreed to the licence without this provision.

54. *Second*, the definition of "Performance" in the agreement provides for [REDACTED]. My understanding is that Pandora

and other webcasters do not compensate Merlin members for such performances under the statutory licence; therefore, the payment for [REDACTED] [REDACTED] represents either an upward adjustment as against the statutory rates or an expansion in the statutory definition of compensable performances.

55. Additionally, while much of Pandora's evidence is redacted, from the elements of the witness statements that are available to me, it seems to me that the direct licence's [REDACTED] [REDACTED] has been used to justify an argument to reduce the statutory rates. Presumably, Pandora's theory would be that if a certain percentage of all performances [REDACTED] [REDACTED].] However, this would be to analyse the provision regarding [REDACTED] in isolation rather than in context of the entire agreement – in particular [REDACTED] [REDACTED]. To give an illustrative example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].] However, such an argument in relation to our direct licence would ignore the effect of the [REDACTED] [REDACTED] [REDACTED] [REDACTED].]

56. *Third*, the First Amendment to our direct licence provides [REDACTED] [REDACTED] (Exhibit 8.) [REDACTED] [REDACTED] would

need to be added to any effective rate implied by the licence. Given the term is [REDACTED], and Merlin will receive at least [REDACTED]

[REDACTED].

57. *Fourth*, the direct licence includes [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] which is intended to ensure that [REDACTED]

[REDACTED]

(Exhibit 1, at § 5.) So for example if Pandora grew listener hours by 25% in 2014, we would

[REDACTED]

[REDACTED]

[REDACTED] We viewed this as a potentially significant advantage since [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

58. The [REDACTED] are therefore exceptionally meaningful to the question of effective compensation. For example, if the statutory royalty rates were set at the level that iHeartMedia proposes, there is no question that the [REDACTED]

[REDACTED] under the direct licence. Furthermore, given that the rates we agreed were [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The Effective Compensation Under the Pandora-Merlin Licence Is Entirely Unclear At This Time

59. This direct licence was announced in August 2014 and only runs until the end of [REDACTED]. As of the time I submit this testimony, many of the key features of the deal have not been properly implemented or are just now in their early stages and, crucially, we do not and cannot at this point know the value of the [REDACTED] under the agreement.

60. [REDACTED]
[REDACTED]
[REDACTED] Notably, despite the contractual requirement that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

61. Some of the delay is because it has taken time and is an ongoing task to determine what sound recordings are covered by the deal [REDACTED]

[REDACTED]

[REDACTED]). Further, if a Merlin member is a distributor, that does not mean that all of the labels represented by that distributor are now operating under the direct licence. The distributor has to determine whether all or some of the labels it distributes will participate. As of now, it is still unclear exactly which and how many sound recordings are covered by the licence.

62. At the same time, some of the key features of the direct licence from the technological side are either not built out or are only recently being implemented. Pandora was not in a position, technically speaking, to fully implement the deal on signature, and even though the agreement [REDACTED]

[REDACTED].]

63. [REDACTED] and as a consequence of the issues I have discussed, it is therefore impossible to assess the value of a direct licence which [REDACTED]

[REDACTED]

[REDACTED]

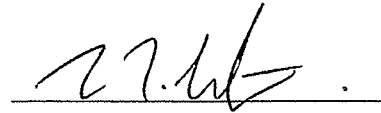
[REDACTED]

[REDACTED]

64. Finally, I understand that the Judges are interested in seeing a robust set of agreements, representing a "thick market" of evidence. I have attached as Exhibit 9 a CD containing copies of relevant Merlin agreements with digital music services.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015

A handwritten signature in dark ink, appearing to read "C. Lexton", is written over a horizontal line.

Charlie Lexton

Exhibits Sponsored By Charlie Lexton

Exhibit No.	Sponsored By	Description
SX EX. 032- RR	Charlie Lexton	Ex. 1 - Pandora-Merlin Licence
SX EX. 033- RR	Charlie Lexton	Ex. 2 – E-mail from Charlie Lexton, May 15, 2014
SX EX. 034- RR	Charlie Lexton	Ex. 3 – Merlin Opt-In Notice re Pandora
SX EX. 035- RR	Charlie Lexton	Ex. 4 – [REDACTED]
SX EX. 036- RR	Charlie Lexton	Ex. 5 – Merlin Press Release
SX EX. 037- RR	Charlie Lexton	Ex. 6 – [REDACTED]
SX EX. 038- RR	Charlie Lexton	Ex. 7 – [REDACTED]
SX EX. 039- RR	Charlie Lexton	Ex. 8 – First Amendment to Pandora-Merlin Licence
SX EX. 040- RR	Charlie Lexton	Ex. 9 – CD of Merlin Agreements

SX EX. 032 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 033 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 034 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 035 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 036 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 037 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 038 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 039 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 040 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

)
)
)
) DOCKET NO. 14-CRB-0001-WR
) (2016-2020)
)
)
)

WRITTEN REBUTTAL TESTIMONY OF

GLEN BARROS

President and Chief Executive Officer, Concord Music Group, Inc.

PUBLIC VERSION

Witness for SoundExchange, Inc.

TESTIMONY OF GLEN BARROS

1. My name is Glen Barros. I am the President and CEO of Concord Music Group, Inc. ("Concord"), one of the world's leading independent music companies. I have been with Concord in that role for the last twenty years.

2. I am familiar with the portions of the public versions of the written direct testimony of Steven Cutler and the amended written direct testimony of Professors Daniel Fischel and Douglas Lichtman that discuss iHeartMedia's direct licenses with 27 independent record companies, including Concord. Most of those discussions were redacted out of the public versions but I was able to see that Concord's direct license with iHeartMedia was offered as a possible benchmark and that iHeartMedia has suggested that the 27 independent record licenses would purportedly support a per-performance royalty of \$0.0002 per performance. I have attached a copy of our license with iHeartMedia as Exhibit 1 and will refer to it throughout my testimony.

3. I also am familiar with iHeartMedia's rate request and assume iHeartMedia takes the position that our direct license supports that rate request. It does not. As I will explain in this testimony, our direct license with iHeartMedia represented a unique opportunity for an exchange of value that is not transferrable to the statutory license context. To put it simply, in return for unique considerations, [REDACTED]

[REDACTED], we agreed to [REDACTED]
[REDACTED].

4. I present this testimony to provide our understanding of the negotiation and terms of our license with iHeartMedia. It is a bit difficult for me to directly respond to iHeartMedia's analysis of that license because the analysis is largely restricted. So, I will instead explain how

we understand the value of the license. And we do regard the deal as valuable. I just take issue with the assertion that a deal that reflected such unique considerations as our license should be considered evidence for what a willing buyer and seller would agree to for webcasting in the next rate period (through 2020). I also do not think it is a fair characterization of our license to suggest that it would support per-performance rates as low as what iHeartMedia proposes.

5. After providing some relevant background information about the Concord Music Group and describing the context for the negotiations of the iHeartMedia license, I will address these points in more detail. I will conclude by commenting, based on my many years in the music industry and 20 years at the head of Concord, on the suggestion by participants in this proceeding that royalties should be reduced because of the purported promotional value of webcasting services.

Background and Qualifications

6. I have been fortunate to live in the world of the music industry for my entire professional career. After completing a Bachelor of Science degree *summa cum laude* in Music and Business from NYU in 1988, I held various positions in record distribution, record production and music publishing. Eventually I became Chief Operating Officer of AEC Music Group, a division of Alliance Entertainment Corporation. My work at AEC Music Group involved the acquisition and management of record companies and record distributors with combined annual revenues in excess of \$100 million. Shortly after Alliance purchased Concord in 1994, I became the President and CEO of Concord Music Group (then known as Concord Records). Even through a number of ownership changes, I have been in that position ever since, and am heavily involved in all of Concord's business operations and, of particular relevance here, licensing deals with digital music services.

7. In addition to my work at Concord, I am very active in the community of the music industry, especially in the independent music community. I am currently on the Board of Directors for the American Association of Independent Music ("A2IM"). I am also currently on the Board of Directors for the Recording Industry Association of America ("RIAA") and the International Federation of the Phonographic Industry ("IFPI").

8. I am extremely proud to be part of Concord's continuing legacy. The Concord Music Group, originally known as Concord Jazz, was named after the Concord Jazz Festival (in Concord, CA) and, since its origin in 1973, is renowned for producing legendary work in the jazz and traditional pop fields. Over the past twenty years, we've acquired a number of other labels and have significantly broadened our musical scope well beyond just jazz. Such legends of the music industry as Ray Charles, Rosemary Clooney, Sam Cooke, Count Basie, John Coltrane, Creedence Clearwater Revival, Miles Davis, Duke Ellington, Ella Fitzgerald, John Lee Hooker, Barry Manilow, Thelonious Monk, Otis Redding and Sonny Rollins have all recorded for labels that are now part of the Concord Music Group. This family of labels includes Concord, Rounder, Fantasy, Concord Jazz, Stax, Telarc, Hear Music, and Heads Up, among many others. In addition to representing our historical recordings, we continue to develop new music, having the honor to currently work with such diverse and important artists as Sir Paul McCartney, Alison Krauss, Chick Corea, James Taylor, Carole King, George Benson, Raffi, Kenny G, Steve Martin, Gregg Allman, Ben Harper, and Esperanza Spalding.

9. What has not changed over the years is our commitment to putting out outstanding recordings no matter the genre. For instance, while our jazz recordings received four Grammy awards this year, another of our recordings won a Grammy award for best bluegrass album, and one of our affiliated artists (via our strategic partnership with Loma Vista), St.

Vincent, won for best alternative music album. Our “market share” of award-winning recordings is strong. In fact, in all years combined, Concord recordings have won 210 GRAMMY awards, which by our count is over 5% of all GRAMMYs ever awarded, measured by category.

10. With such a rich history among our labels and a broad array of artists, it is not surprising that we own the rights to a substantial number of recordings that were fixed prior to February 15, 1972 or, as they are more commonly characterized, “Pre-72” recordings. For instance, one of our most iconic sets of recordings is the entire body of work from the band Creedence Clearwater Revival. Another is the evergreen Vince Guaraldi 1965 album, *A Charlie Brown Christmas*. Many of the recordings of our classic soul label, Stax, are also Pre-72 recordings, as are those of Little Richard and Sam Cooke on our Specialty label. And much of our truly legendary jazz catalog, which includes names like John Coltrane, Miles Davis, Thelonius Monk and Sonny Rollins was also made prior to 1972. The list goes on and on. Unlike many record companies, we often make substantial investments not just in new artists but also in showcasing our classic catalogs and acquiring new ones, such as the Vee-Jay Records catalogue we purchased last year, which includes some amazing gems from the 1950s and 1960s.

11. In all, I estimate we have about [REDACTED] Pre-72 sound recordings currently in our database for licensing to music services, which is about [REDACTED] of that database. We also have a substantial number of additional Pre-72 sound recordings – maybe as many as [REDACTED] more – that we would make the effort to include in our database if we were certain that we could receive compensation for them from digital music services.

12. I note this because, while every record company may have certain differences in its repertoire, for us, issues like whether a music service will pay for performances of Pre-72 recordings have a significant impact on our assessment of the value we receive from licensing

our repertoire to a service. That issue, therefore, has impacted our negotiations for direct licenses with digital music services, including our license with iHeartMedia. While Pre-72 recordings are one example of a particular concern for Concord, other labels may have their own particular issues that affect their licensing practices. Such idiosyncratic reasoning is especially true among independent record companies who vary greatly in shape and size and often can be driven in their decision-making by a host of label-specific considerations.

Negotiations Over the iHeartMedia-Concord License

13. For an independent music company such as Concord, a strong partnership with iHeartMedia, formerly Clear Channel, is a very attractive proposition. I understand them to be the largest owner of terrestrial broadcast stations, operating nearly 850 of them around the country which are reported to reach nearly 250 million listeners a month. iHeartMedia also runs some of the most prominent live music events each year, including the iHeartRadio Media Festival. It generates billions of dollars in revenue each year from those sources without even beginning to account for its digital presence. We, therefore, welcomed the opportunity to meet with iHeartMedia to discuss the possibility of a direct license.

14. The discussions of a possible direct license began in August 2012, not long after iHeartMedia and Big Machine Label Group (“BMLG”), which features such prominent artists as Taylor Swift and Tim McGraw, had announced a direct license. The BMLG announcement indicated that iHeartMedia was willing to offer a share of terrestrial broadcast revenue to record labels willing to engage in a direct license. For decades, record companies have been seeking recognition of a performance right on over-the-air terrestrial broadcasts, and we were well aware of how large the terrestrial revenue base was – and how it exceeds any digital revenue base that existed in 2012, or now for that matter. Entering the conversation with iHeartMedia, we

generally assumed it would be difficult to get better terms than BMLG had secured, given the prominence of its artists on terrestrial radio. But the opportunity to share in terrestrial revenue was a significant one and, from our perspective, a conversation worth having.

15. In August 2012, we met in person with Steven Cutler and Tres Williams of iHeartMedia to discuss a deal. In early September, 2012, they sent us an outline of proposed deal terms. Later in September, they followed up with a video presentation, in which they

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] That

counterproposal was sent to iHeartMedia on October 2, 2012. Our position was that [REDACTED]

[REDACTED]

[REDACTED] Attached as Exhibit 2 is a copy of that draft license that includes [REDACTED]

[REDACTED] iHeartMedia refused [REDACTED]

[REDACTED] We took that to mean that [REDACTED]

[REDACTED]

The Concord-iHeartMedia License Was Centered Around a Unique Value Trade-off

16. We continued to negotiate with iHeartMedia over the next several months. Our understanding was that they were willing to offer us a [REDACTED]

[REDACTED] As noted above,

this [REDACTED] because it was an

altogether new stream of revenue from a pool that we knew was huge and likely to continue to be

huge for the term of the direct license. While we could not know for certain, we believed that [REDACTED]

17. We understood that an arrangement for a share of terrestrial revenue was not the same as receiving a terrestrial royalty because there cannot be a terrestrial royalty due while there is still not a terrestrial performance right in the United States. Because there is no terrestrial performance right, both we and iHeartMedia understood that this [REDACTED] [REDACTED] was not a payment for terrestrial performances. Rather, it was another way to compensate Concord for the rights granted in the license and to do so by tapping into a revenue pool that was massive and previously unavailable.

18. That said, this motivation for this direct license was not simply a matter of earning a certain amount of money, like a flat fee or advance. We appreciated the opportunity to participate in an established revenue pool that had the potential to be quite significant if any of our artists were to catch the attention of radio programmers. At least anecdotally, radio playlists can be narrow at times, so with a hit and revenue sharing, there is a possibility for a large influx of revenue. The possible upside then of the [REDACTED] is significant, particularly when you have as much faith in the quality of your artists' recordings as we do. In my view, it is not something that can be accounted for just by looking at what we have received to date, as it can always scale especially if a particular artist has a radio hit.

19. Also, despite not being given [REDACTED], we believed we would benefit from having a direct license relationship, i.e., becoming a preferred partner. In that regard, iHeartMedia offered a number of opportunities to collaborate for our mutual benefit. For instance, recognizing our prominence in jazz, iHeartMedia offered to allow Concord [REDACTED]

[REDACTED], which was an attractive proposition both for ourselves and our artists. [REDACTED]

[REDACTED] Of course, iHeartMedia made no promise of additional – or any – terrestrial plays, nor did we request any. Regardless, we knew that by executing a direct license, we would gain the opportunity to [REDACTED] and we would, for lack of a better phrase, be “on the radar” within iHeartMedia’s ecosystem – one that spanned the full breadth of the digital, terrestrial, and live music world.

20. In return, iHeartMedia wanted us to agree to [REDACTED] [REDACTED]. As reflected in the ultimate license, iHeartMedia wanted royalty rates for its then-nascent custom radio platform that [REDACTED] [REDACTED]. In fact, our direct license expressly refers to [REDACTED] [REDACTED]. (Exhibit 1, at § 1(ee).) At the time, iHeartMedia was operating under broadcaster/NAB rates that closely approximated the CRB rates set by the Judges in the *Webcasting III* proceeding. So, as I understood it, for agreeing to [REDACTED] the non-simulcast digital rates and standard webcast rates, Concord would receive an additional [REDACTED] [REDACTED] and we would deepen our relationship with one of the most significant companies in the music industry. In addition, during the course of the negotiation, iHeartMedia agreed to [REDACTED] [REDACTED]. Again, there was no confusion about the desire [REDACTED] because the license itself expressly [REDACTED]. (Exhibit 1, at § 1(d).)

21. In many ways, that was the standard offer that iHeartMedia was making for a direct license. But that alone would not have been enough to lead us to agree to the direct license. Given Concord's unique catalog with its high number of Pre-72 sound recordings, we needed iHeartMedia to [REDACTED] [REDACTED]. They did and the license expressly [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Exhibit 1, at § 1(h).

22. Though there were undoubtedly other components of the license that were heavily negotiated, this was, to me at least, the ultimate tradeoff: Concord would receive [REDACTED] [REDACTED]; and (c) and the opportunity to deepen our relationship with iHeartMedia and hopefully find additional ways to work together in the future. In return, iHeartMedia would receive a [REDACTED] as well as access to our artists and repertoire across their platforms.

23. As an example of the possibilities of this new relationship, during the course of this negotiation, we were preparing for an important new release by Paul McCartney. iHeartMedia was preparing for its iHeartRadio Festival in Las Vegas that year. Even though we had not completed the direct license at the time, we started to work with iHeartMedia on a major

marketing campaign that centered around Paul headlining the event. This clearly demonstrated the possibilities associated with our two companies having a direct partnership.

24. In September 2013, iHeartMedia announced its direct license with Warner Music Group. We were given the impression that, at this point, [REDACTED]

[REDACTED] Because the trade-off offered Concord [REDACTED] we had been seeking [REDACTED]

[REDACTED] and gave us – an independent music company – the opportunity to build a positive relationship with a major industry player, we decided to agree.

25. It is very important to understand that we would not have agreed to the rates proposed by iHeartMedia in the absence of those unique opportunities. The tradeoff of value was inextricably bound together. And, while the spirit of the discussion (and our continuing relationship) was to look for collaborative, win-win situations, there was no business reason to agree to the license without these unique considerations.

26. The importance of compensation for performances of [REDACTED], at least for Concord, is clear from our other direct licensing behavior. At one point, we were in early discussions with [REDACTED] for a possible direct license. We learned, however, that, at least at that time, [REDACTED]

This was one of the reasons that negotiation never progressed.

27. By contrast, based upon our understanding of the Pandora-MERLIN license, [REDACTED]

[REDACTED]. Because MERLIN was the contracting party with

Pandora, individual members, such as Concord, were not allowed to see the text of the actual agreement, only a summary forwarded by MERLIN to its members. Attached as Exhibit 3 is a copy of the summary provided to us by MERLIN.

28. Since the MERLIN license required Pandora to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Concord's Direct Licenses Are Not Useful In Determining Statutory Rates

29. Our direct licensing behavior should not be taken as an indication that Concord believes that either the Concord direct license with iHeartMedia or the Pandora-MERLIN license should be the basis for the statutory webcasting rates. Quite the opposite: Both of those licenses reflect value tradeoffs that are not applicable to the statutory license rates. As far as I understand it, the statutory license cannot require a service to allow us to participate in [REDACTED]. In fact, many webcasters have no [REDACTED] to speak of and, therefore, a revenue share from them would be meaningless. Similarly, if the statutory license does not expressly guarantee that [REDACTED], that would exclude the substantial consideration at the core of our willingness to agree to those licenses. Finally, there is no meaningful way that I am aware of that the statutory license can require a service to provide record companies with partnership opportunities, especially those related to non-digital platforms such as live events. That is why direct licensing always exists as an

alternative if a service wants to seek a discount off statutory rates by offering other value that is unavailable to record companies under the statutory license.

30. If the purpose of this proceeding is to determine what the market rate would be if there was no statutory rate, then it does not make a lot of sense to me to use our direct license, which is built around references to various existing statutory rates, in deciding what the statutory rate should be for the next rate period. Our license with iHeartMedia was a product of

[REDACTED]

[REDACTED]

[REDACTED] Exhibit 1, at §1(ee).

A license that is so obviously tethered to statutory rates reflects a different kind of bargain, because the service, iHeartMedia, [REDACTED] in crafting a direct license with us. Furthermore, our direct license, as I explained before, involved consideration that is simply unavailable as part of the statutory royalty rate, like becoming a preferred partner. To use our license as the basis for the statutory license would then be impossible without ignoring the most important pieces of consideration that actually influenced our willingness to enter the deal.

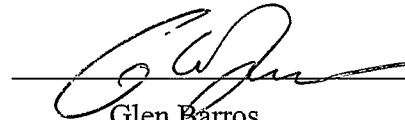
Webcasting Is Increasingly Substitutional

31. While we at Concord are always thinking about ways to create collaborative situations with digital music services, it is important to remember that the digital music business is still in its early years and that business models associated with it are in flux. In part, we viewed the iHeartMedia direct license as an experiment – a chance to work with an industry powerhouse in the true spirit of partnership, wherein both parties' needs are holistically met. This includes both sides receiving income and marketing benefits from our arrangement.

However, as someone who has been at the forefront of a leading independent music company for the last 20 years, when I look at the webcasting world, I take umbrage at the frequent suggestion by webcasters that their service is “promotional” and therefore they should not have to pay copyright owners the fair value of the recordings that are the content they sell. To me this is equivalent of a retailer telling you that it “promotes” your product by selling the product in its store. Webcasters are using music to engage their audience and ultimately generate income, which is the end point for their service. The days in which webcasting operations can act as if they are purely promotional are over, if they ever existed. In webcasting, music *is* the experience and, as individuals continue to access music via services such as these rather than purchase copies for their own collection, sales of recorded music continue to decline, with overall industry sales being down more than 50% from their high prior to the digital revolution. It seems clear to me, therefore, that webcasting is increasingly becoming more substitutional as an enterprise.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015


Glen Barros

Exhibits Sponsored By Glen Barros

Exhibit No.	Sponsored By	Description
SX EX. 041 - RR	Glen Barros	Ex. 1 - Concord-iHeartMedia License, October 1, 2013
SX EX. 042 - RR	Glen Barros	Ex. 2 - Draft of Concord-iHeartMedia License – Concord Counterproposal
SX EX 043 - RR	Glen Barros	Ex. 3 - Merlin Notification Concerning Pandora License

SX EX. 041 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 042 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 043 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

)
)
)
) DOCKET NO. 14-CRB-0001-WR
) (2016-2020)
)
)
)

WRITTEN REBUTTAL TESTIMONY OF

SIMON WHEELER

Director of Digital, Beggars Group

PUBLIC VERSION

Witness for SoundExchange, Inc.

REBUTTAL TESTIMONY OF SIMON WHEELER

1. I am the Director of Digital at Beggars Group. I have previously submitted testimony in this proceeding that sets forth my professional background and experience with the music industry – in particular, my experience with negotiating licenses with digital music services.

2. I am generally familiar with the rates proposed by Pandora and am aware that Pandora's economist relies upon Pandora's license with Merlin as a benchmark in this proceeding. I have also reviewed the public version of the testimony of Pandora witness Mike Herring.

3. In Mr. Herring's testimony, he specifically points to Beggars Group as a notable label group opting into the direct license. I submit this testimony to respond and explain my view of that license, which is that it is not very informative for setting the statutory royalty rate. The Pandora license is not the result of free market negotiations, but rather the result of an opportunity to experiment with direct licensing under the statutory license. As I will explain below, we do see value in that opportunity, but it is, by and large, value that does not translate well to the statutory license.

4. As a Merlin member, Beggars Group receives notifications of proposed Merlin actions that inform whether we opt into the Merlin action or agreement. I have attached as Exhibit 1 a copy of the notice we received from Merlin concerning the Pandora license. I will refer to Exhibit 1 throughout my testimony.

The Pandora-Merlin License Is Not a Marketplace Deal

5. The Pandora-Merlin license was entangled from the outset with the existing statutory rates that Pandora was already paying. In fact, the Merlin notification plainly indicated that Pandora

operates currently under the "Pureplay" rate structure and [REDACTED] [REDACTED] (Exhibit 1, at 4.) This was plain to me as soon as I saw that the stated rates in the license were [REDACTED] [REDACTED] statutory rates that Pandora pays. (Exhibit 1, at 9-10.) That is not surprising to me. Unlike most negotiations, in this instance, Pandora had direct access to our repertoire through the statutory license and already knew the rates applicable to that statutory license.

6. That is an entirely different negotiation than the types of negotiations that I described in my previous testimony involving services that include on-demand functionality. If anything, the Pandora-Merlin license is more akin to digital services that allow user-generated content. As I described in my previous testimony, those negotiations are riddled by the fact that the record company has a very limited ability to withhold its content. Here, Merlin and its members, including Beggars, have no ability to withhold content and no ability to price their content anywhere above the statutory license rate.

7. I would find it very difficult to assess whether we would have agreed to this deal in the absence of the existing statutory rates that Pandora pays. That just never factored into our decision because we understood that the license runs on a term that is [REDACTED] with the existing statutory rates. If the statutory rates applicable to Pandora change after the existing rates expire, my understanding is that the [REDACTED] [REDACTED]. (Exhibit 1, at 10.) Given this, the only assessment that we can make is whether the general construct of negotiating a direct license [REDACTED] the existing statutory rates is worthwhile.

8. I can tell you that we would not have opted into a deal that set Beggars' obligations [REDACTED] the term applicable to the existing statutory rates. Unlike a deal in the marketplace, we consider the Pandora-Merlin deal to be a reflection of the existing statutory regime.

This Was a Statutory Rate Experiment

9. We knew from the start that this was a short-term experiment to test if there are benefits to direct licensing *pursuant to* [REDACTED]. That is why it is so important that Merlin and, in turn, we have the ability to walk away from the deal if Pandora's [REDACTED] [REDACTED].

10. I was acutely aware that this proceeding was soon to start and that the deal would [REDACTED] set in this proceeding took effect. We felt the agreement was structured as carefully as possible not to impact the existing rates and was mindful of the impending proceedings as the deal was put together. We were confident that the way the deal was structured would not be seen as undercutting existing rates. We had comfort in opting because the deal was so [REDACTED] on the existing statutory rates, no one would suggest it was anything but the outgrowth of those rates. We were wrong. Someone did and that someone was Pandora. But it is difficult to understand how this type of license could inform the real question I addressed in my prior testimony, i.e., what is the value of a performance of music in the *absence* of the statutory rates, particularly where statutory music services are becoming indistinguishable from on-demand services.

11. Moreover, while there was an ability to experiment with [REDACTED] [REDACTED] in terms of compensation to the [REDACTED], we were mindful that the artist share under the license must be treated [REDACTED] as it was outside of the license. Hence, the license ultimately required [REDACTED] [REDACTED], which further confirms that the license was primarily an opportunity to experiment with compensation to labels.

12. This discussion explains why I would not look to the Pandora-Merlin license to understand what willing record companies would sell their music for in the absence of a statutory regime. The rest of my testimony explains why Beggars Group would opt into the license despite these reservations.

The Pandora-Merlin Experiment Allowed Beggars to Maximize Activity During a Period of Bounded Rates

13. On other music platforms, such as on-demand or interactive services, we have several ways of maximizing revenue beyond just pushing for additional activity. We can, for instance, couple an upsell incentive with a share of subscription revenue. This is why, as I described in my prior testimony, we are not platform agnostic in general.

14. Once statutory rates are set for a non-interactive service, the primary way, and perhaps the only way, to increase that revenue stream is to maximize activity on the service. This is for two reasons. First, the economic terms of the relationship are pre-defined by the statutory license and therefore are naturally constraining. So, we have largely lost the ability to negotiate over the rules of monetization before the negotiation commences. Second, because services are increasingly user-specific or tailored, we find ourselves making the best of difficult situations caused by increased personalization. We must maximize revenue out of the service now. Short of pressing play ourselves, there is not much else we can do to inspire revenue except to seek to maximize activity. There is a finite size to the activity, i.e., consumption of music, on any particular non-interactive music service, even one that is growing and even one as large as Pandora. Yes, activity *is* the end user product, and our revenue stream as a record company is tied to the amount of activity, i.e. performances, of our repertoire.

15. This is certainly how I regard Pandora. The rates they pay for the use of Beggars Group Music have been defined for years now by the statutory royalties they elect. We do not

regard Pandora as an opportunity to expand other sources of revenue – Pandora is a consumption platform. So, the monetization challenge is how to increase activity on a service where the rates and terms are not subject to negotiation or forces of the market.

16. By opting in to the Pandora-Merlin deal, we made a decision to attempt to maximize our activity first, not last. The Merlin notification suggested that our activity would increase and, beyond a certain level of increase – [REDACTED] – the [REDACTED] would not be operative. I understand that Pandora has told Beggars Group that it is overindexing Merlin labels at a rate of [REDACTED]. Now, I have yet to see any reporting data from Pandora that confirms this or puts in real terms how this affects the royalties we have received. However, if the Merlin notification is accurate, and any discount [REDACTED] is capped at [REDACTED] steering, and if Pandora is accurately reporting their steering, and it is at [REDACTED], then Beggars Group has increased its monetization above its natural performance rate in a very significant manner. On a consumption-based platform where the rates are bounded by regulatory forces, the most we can do is seek to maximize our own consumption.

17. The other reason we chose to participate in this limited term license is that steering cannot be replicated across the industry. It is not often the case that independents are offered the first opportunity to maximize *relative* consumption vis-à-vis other record companies. This was one of those rare opportunities where Pandora, for whatever reason, presented us first with the opportunity. Now, we are fully aware that Pandora cannot possibly steer *all* record companies so the *relative* benefit in this license is not something that can be translated to the statutory context. Put another way, the very nature of steering is that some record companies are steered toward and some companies, as a result, are steered *against*. It cannot be the case that all record companies are steered towards at the same time.

18. We also received important comfort in the form of the [REDACTED] on royalty steering discounts. The Merlin notification stated unequivocally that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Exhibit 1, at 14.) Based on this assurance, my understanding is that the [REDACTED] establishes that, [REDACTED] steering, the total royalties on a per-play basis would be no different. Similarly, the [REDACTED] insure parity with the statutory license regime because they expressly account for [REDACTED]
[REDACTED]. (Exhibit 1, at 10.) These assurances led me to believe that the agreement would lead to *increased*, not decreased, royalties.

19. To avoid any confusion, these consumption-maximization reasons all start with the assumption that, because Pandora knows what it can and must pay per performance under its existing statutory rates, we cannot truly negotiate with Pandora as if the license was the product of a free market. Put another way, independent record companies will not be able to have a meaningful discussion with Pandora about the market value of a sound recording performance unless and until Pandora's eligibility for its current statutory rates has lapsed or the applicable statutory rates are set at a level that requires Pandora to pay near the levels of its actual competitors, including on-demand streaming companies in the music streaming marketplace. If that world existed right now, we would not just assume that the market rate is the ballpark of what Pandora pays under the statutory regime.

The Pandora-Merlin License Presented Opportunities Unique From the Statutory License

20. While the core financial terms of the Pandora-Merlin license are [REDACTED] to the statutory rates available to Pandora, we also opted into the limited period direct license in hopes of exploring valuable opportunities that don't often happen in a direct licensing context.

21. Before detailing these unique opportunities, I want to comment briefly on the characterization by Pandora and others that they are affording us "promotional opportunities" under this deal merely by increasing our label plays on the service. As I explained in my prior testimony, I do not regard consumption on non-interactive services as promotional. This is consumption on a consumption-oriented service. Consumption is the product we are paid on. So, while increasing consumption of Beggars repertoire helps increase consumption on that platform, it does not meaningfully assist us with other streams of revenue.

22. I sometimes find that Pandora appears to talk under an old-fashioned mindset where it regards itself as being an extension of terrestrial radio. That is not how I see Pandora and not how the market regards them. Put into Pandora's language, if they regard an activity as "promotional" (in their words), that means we should provide them rights to our repertoire for nothing or almost nothing on the basis that there will be some other form of commercial benefit post-consumption. But consumption on platforms like Pandora is not a form of inverted commerce in which the play of our music has a higher value to us than the use of our music has to the service. Pandora's way of thinking simply does not make sense to me in a consumption world because in that space, the monetization comes through the listen and not the purchase. If anything, I regard these increasingly customized webcasting services as creating cannibalization of consumption from other streams of revenue.

23. By contrast, I did see some of the opportunities presented by the direct license as being unique. I attended a meeting in September 2014 in which I had a lively discussion with Pandora about a number of opportunities that were not as available to Beggars Group prior to the license. These include [REDACTED] to parts of the service that do not operate under statutory rates (e.g., [REDACTED]), direct communications with fans on Pandora's platform, [REDACTED] etc. Most of these opportunities are not tied to the statutory license and some of them, [REDACTED], may not even be eligible transmissions under the statutory license. So, one of our motivations for doing a direct deal was the ability to tap into opportunities that may not have been available or *as* available when Pandora simply rested on its statutory rate terms.

24. Pandora also said they would provide us with preferential access to their data. Because we opted into the Merlin license, we are now starting to receive access to data and other partnership opportunities before other record companies. Because the provision of data or preferential access to interactive album premieres or advertising discounts are all benefits that are not required by a statutory license, they demonstrate that there is significant negotiated value in the direct licenses that is not reflected or translated into the statutory rate.

We Have Not Been Able to Understand the True Value of the Merlin-Pandora License

25. In many different ways, the performance under this license whose term is more than half over has been puzzling if not disappointing. We have found real and significant obstacles in [REDACTED]. This has led us to question what the true value is of the license. While we are confident Pandora will ultimately deliver on its promise, we are now past the mid-point of the license and the feature implementations still continue to develop.

26. For example, so far there has been a real dearth of [REDACTED]. I do not know whether [REDACTED] or other mechanisms in the deal have been triggered. Outside of an anecdote reported in a meeting about steering for all Merlin labels, I am not aware of how much Beggars Group repertoire has been steered or played. I do not even yet know if there was a guarantee shortfall for Pandora in 2014.

27. [REDACTED]
[REDACTED]
and on a very limited basis. Pandora has reported that it is still working or just now piloting other features such as the [REDACTED]. These types of obstacles are troubling, particularly when the license term is short and quickly expiring. We may never be able to take full opportunity of all the negotiated clauses.

28. With respect to the purported "promotional opportunities" like branded shows or album premieres, we have had lively conversations with Pandora but these, [REDACTED]
[REDACTED]
[REDACTED]. That mindset misses the point completely. All uses of our sound recordings deserve compensation.

29. Taken together, there is a significant amount of information we do not have that I would need before deciding whether we would agree again to a license structure like this that is tied directly to statutory rates, irrespective of the rates themselves. For instance, we would need granular data on the service and any artificial increase of performances. If I am trying to assess the value of a license, and whether to renew it, lapse it, or modify it, I always think it is important to look at how the deal has actually performed. Thus, even if one can overlook the statutory effect on the Merlin license and disregard the inability to replicate the benefits across

the industry, I would have a hard time assessing the market value of the Pandora-Merlin license given the difficulties with implementation of the deal and lack of available reporting so far.

30. Finally, I understand that the Judges are interested in seeing a robust set of agreements, representing a "thick market" of evidence. I have attached as Exhibit 2 a CD containing copies of the relevant Beggars Group agreements.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015

A handwritten signature in black ink, appearing to read 'Simon Wheeler', written over a horizontal line.

Simon Wheeler

Exhibits Sponsored By Simon Wheeler

Exhibit No.	Sponsored By	Description
SX EX. 044 - RR	Simon Wheeler	Ex. 1 – Merlin Notification of Proposed Action Concerning Pandora
SX EX. 045 - RR	Simon Wheeler	Ex. 2 – CD of Beggars Group Agreements

SX EX. 044 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 045 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

)
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) DOCKET NO. 14-CRB-0001-WR
) (2016-2020)
)
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)

WRITTEN REBUTTAL TESTIMONY OF

DARIUS VAN ARMAN

Co-Founder and Co-Owner of Secretly Group

PUBLIC VERSION

Witness for SoundExchange, Inc.

REBUTTAL TESTIMONY OF DARIUS VAN ARMAN

My name is Darius Van Arman, and I am the co-founder and co-owner of Secretly Group, which includes the record labels Dead Oceans, Jagjaguwar, The Numero Group and Secretly Canadian, and which is affiliated to and has common ownership with the independent distribution company SC Distribution. I set forth my background and experience in the music industry in my prior testimony in this proceeding.

In this testimony, I will address the Pandora-MERLIN license offered as a benchmark in this proceeding by Pandora and iHeartMedia. I have reviewed the public version of the testimony of Pandora CFO, Mike Herring. I am also aware that economists from Pandora and iHeartMedia have analyzed that license, though I was unable to view most of their analysis about the deal because it was designated restricted. I do know, however, that both Pandora and iHeartMedia contend that the Pandora-MERLIN license supports their rate proposals, which start at \$0.00110 per performance and \$0.0005 per performance, respectively.

I am in a unique position to comment on the Pandora-MERLIN license. In his testimony, Mike Herring specifically used Jagjaguwar as an example of a notable record company repertoire covered by the license. (Written Direct Testimony of Michael Herring, at ¶ 35.) In so doing, he noted that Jagjaguwar was “[c]o-founded by Darius Van Arman, a member of SoundExchange’s board of directors.” The implication, I assume, is that it would be noteworthy if one of the record labels in my group had opted into the Pandora-MERLIN license.

This mistakes the decision to participate in a direct license offer—especially one that is derived from [REDACTED] the existing statutory rates themselves—for the relevant question of this proceeding: whether such a license is worthwhile to be a benchmark for the statutory license in the next rate period. That is the question I will respond to here. I have a

strong view that the Pandora-MERLIN license is an inappropriate basis on which to derive statutory license rates for webcasting in future years.

My testimony will address three points. First, licenses based upon contractually-based steering do not translate well to the statutory license context. Second, the Pandora-MERLIN license is not a good basis for the statutory license because it is too closely derived from and related to the existing statutory license rates that Pandora pays. Third, there is still not enough operational certainty around this license—even though it is set to expire [REDACTED] [REDACTED]—to give record labels any comfort in application of its terms to the statutory license.

As I've noted elsewhere, the statutory license is vital, especially for the independent music community. I hope the Judges will not allow the Pandora-MERLIN license undermine the statutory royalty rate.

I. The Pandora-MERLIN License's Reliance on Contractually-Based Steering Undermines Its Value In Determining the Statutory Royalty Rate

In my direct testimony, I spoke about my concerns regarding the growing use of pro-rata terms or "play-share incentives," i.e., contractual terms that offer record labels a promise to skew a service's plays in their favor in return for economic concessions, usually on per-play rates. (Written Direct Testimony, at 14.) In many ways, the Pandora-MERLIN license, with its prominent promise of steering incentives, is an example of what I had in mind.

At the outset, let me say that I understand the appeal of gaining a first-mover or direct-license advantage, particularly in an environment where independent record companies are typically not afforded the first opportunity to take advantage of such a term. In such a context, there may be good reason to act defensively and seek to secure position within a platform when you know a service is willing to substitute editorial discretion for contractually-based preferential treatment. There may even be some basis to justify direct participation in such an arrangement

on the basis that unlike many steering arrangements, the Pandora-MERLIN license is well known and MERLIN is an inclusive and open-ended collective such that most record companies—regardless of their size and including artists who are self-releasing—could choose to obtain the benefits of the MERLIN license if they chose to join. While I would prefer an environment in which services provided repertoire to consumers and let the value of the sound recordings stand on their own merit, I recognize that services, both interactive and non-interactive, will create contractually-based play-share incentives at times, and each record label, including those of Secretly Group, must weigh the appropriate value to give to such incentives in the existing market based on direct licenses.

All of that is, in my opinion, besides the point for this proceeding. What I unquestionably object to is the use of play-share incentives as a method of weakening the statutory license. Whether or not it makes sense for record company A to sign a direct deal that steers plays towards them and away from other record companies, it is obvious to me that such a deal is not universalizable.

By that, I mean that the benefits offered record companies through direct license participation are extremely diluted or entirely negated when the license is applied to all copyright owners and artists subject to the compulsory license. This is because the basis of a steering arrangement is favoring certain sound recordings because, as a service, they are available to you to play at a relatively lower cost or because you have received some other economic concession in return. That may well be the reality of the directly licensed market, but that is not the world operating under the statutory license. As I have said previously, the statutory license is immensely important because it *is* the level playing field. Services receive the ability to play all sound recordings on the same basis. Thus, steering arrangements are antithetical to a core

principle of the statutory license—parity among sound recordings on a platform, regardless of ownership.

Grafting concepts like steering onto the level playing field of the statutory license artificially deflates the value of a sound recording to the industry as a whole. Put another way, if a play-share incentive cannot be universalized to extend to all record companies and artists, then neither should the discount or trade-off given by the record company or artist to the service be foisted upon *all* record companies and artists as well. To do so would doubly denigrate the record company that resists the play-share incentive. That company would suffer by resisting steering in the direct license market, and be penalized again by the benchmarking of that same steering against the statutory license. This dynamic, alongside my personal conviction that I've previously shared, makes me desire a world where such direct deals are not permitted to have play-share incentives. However, regardless of whether such deals should be allowed, it is unquestionable to me that such deals should not be used to determine (and ultimately weaken) the statutory license.

II. The Pandora-Merlin License Is Too Closely Related to the Statutory License to Serve as the Basis for the Statutory License

It is no secret that the Pandora-MERLIN license was derived from the existing statutory license rates available to Pandora. Perhaps because Pandora is barred from relying upon those rates as a basis for their rate proposal, Pandora proposed an offer that starts and ends with those rates [REDACTED] From what I know of the license, I understand that the stated headline rates [REDACTED] [REDACTED]. To me, it seems impudent to allow a deal derived so intimately from the statutory rates serve such a role in determining the statutory rates.

In my direct testimony, I spoke in some detail about the importance of a strong statutory license. (Written Direct Testimony, at 15-16.) In that testimony, I explained that record companies, especially independent record companies, will have a difficult time negotiating above the statutory rate with a service that is eligible to use the statutory license. The Pandora-MERLIN license is a good example of this. Here, Pandora operates under existing statutory rates. Pandora makes a direct license that, at least in one part, [REDACTED] [REDACTED] (here, for additional spins or [REDACTED] [REDACTED]). Pandora then presents that [REDACTED] part of the direct deal to the Copyright Royalty Board in hopes of lowering the statutory rate. And then, in the next cycle, Pandora again or another service can make another direct deal, discounted off the new lower statutory royalty rate, and point to how closely related it is to the statutory license. And so on. So long as direct deals derived from the existing statutory rates are used to determine the next statutory rates, the statutory rate will be infinitely regressive, regardless of what is actually happening in the market. And, so long as the statutory license is compulsory such that record companies like mine have no ability to walk away from this arrangement, the statutory license will operate as a ceiling—a collapsing ceiling under the dynamic I describe. Thus, in my view, the statutory rate must be set without regard to deals directly tied to the existing rates, such as the Pandora-MERLIN license.

I have spent the last several months reflecting on the relationship between the Pandora-MERLIN license and this proceeding. The license—the first direct license that serial statutory licensee Pandora has ever executed—was announced less than 10 weeks before the parties submitted their cases. Pandora then relied upon the direct license a license with no meaningful record of performance—to argue that *all* record companies and artists should receive a lower

royalty rate than even the one specified in the Pandora-MERLIN license from *all* webcasters, regardless of whether those webcasters steer or offer any of the other benefit received by the MERLIN labels under the Pandora-MERLIN license. Given the very short time between the announcement of the license and the filing of the parties' cases, economists from Pandora (and subsequently, iHeartMedia) must have rushed to analyze the deal, even though the implementation of many of the actual features and operations of the deal have been delayed many months into its [REDACTED]. And, I expect there will be rebuttal testimony touting the updated figures of MERLIN members opting in to the license or how the interest in this license has stimulated another deal with another independent company, though that same testimony likely will not explain that Pandora is paying [REDACTED].

Observing all of this has very much impacted my thinking about the Pandora-MERLIN direct license. It strikes me that some distance between a direct license offered as a benchmark and the statutory proceeding itself may be useful, if not crucial.

III. There is Very Little Operational Certainty Around the Pandora-MERLIN License Despite [REDACTED]

In many ways, the Pandora-MERLIN license is more of a commercial thought concept than an actual reality. Several months into a license that is set to expire at the end of [REDACTED], I am concerned about the delayed implementation and ongoing uncertainty as to the operation of the deal. I do not imagine I am alone. Pandora has faced challenges in [REDACTED] [REDACTED]. In fact, this month Pandora has undergone a [REDACTED] [REDACTED]. And, even though Mr. Herring's testimony touted the participation of Jagjaguwar in the license, our actual participation has been limited at best. At this point in time, I lack confidence that we have (or will) obtain the benefit of our

bargain under the license to all the features we were promised or that anyone will have a true sense of the value conferred by the license amongst the operational uncertainty.

That is far from the only problem associated with the implementation of the license. The mechanics of the direct license are not in place yet. As I understand it, [REDACTED]

[REDACTED]. We are particularly concerned with that issue because we are a label group that firmly stands behind treating artists fairly, and we always understood that at least the [REDACTED]

[REDACTED] to ensure transparency to all stakeholders. We are also very concerned from the perspective of our affiliated distribution company, SC Distribution, which has the responsibility to accurately and in a timely fashion account to the labels it distributes. Right now SC

Distribution is not confident it can fulfill this responsibility, because it doesn't have a clear vision of how and when the revenue stemming from the Merlin-Pandora deal will flow to it. In fact, though there is less than a year left on the license, [REDACTED]

[REDACTED] That may only be the tip of the iceberg, as I do not know whether Pandora has actually fully implemented the many featured offerings it promised as part of the license.

Absent assurances that these operational issues will be resolved well and quickly, I am reticent to put *any* value on the license, regardless of any and all other considerations. This is a quickly expiring license whose term ends [REDACTED]

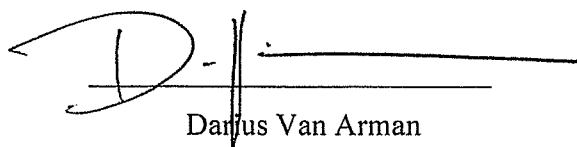
[REDACTED] Given the timing, we are concerned both that we will not receive the benefit of the consideration promised under the license and that it will be difficult to

appropriately value what consideration the license represents given its delayed implementation.

With respect to the proceeding, I question whether it makes sense to rely at all upon a license that still is not close to fully operational with less than a year left in its term.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015



Darius Van Arman

In re

**DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)**

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Senior Vice President, Promotion Operations
Columbia Records, Sony Music Entertainment



BACKGROUND

1. My name is Jim Burruss. I am Senior Vice President, Promotion Operations at Columbia Records. Columbia is one of the recorded music labels within Sony Music Entertainment ("Sony Music"). I have held this position since 2000. I am responsible for all of Columbia's promotional operations. An important part of these operations involves the promotion of Columbia releases to terrestrial radio. However, our operations include numerous other channels for promoting our artists' releases, including television (performances, interviews, panels), retail, music video channels, print media, recorded advertising on both television and radio, social media outlets, online publications, blogs, internet sites that relate to music and popular culture, and concerts, to name just a few.

2. I have spent my entire professional life in the music business, with a particular emphasis on record promotion. Prior to assuming my current position, I was Vice President of Operations at Columbia. Before that, I was a promotion manager for Columbia. Before joining Columbia, I worked in promotions for Virgin Records and for RCA Records. I started in the business as an on-air disc jockey and program director at my college radio station, KUSF in San Francisco.

DISCUSSION

3. I have reviewed the written direct testimony of Bob Pittman. Mr. Pittman asserts that terrestrial radio provides "billions of dollars" of "free advertising" to artists and labels. (Pittman WDT, at ¶ 10.) I disagree. Music is the backbone of the terrestrial radio industry. Terrestrial radio stations are the only business in this country that can build their business on recorded music without paying for it.

4. I also have reviewed the written direct testimony of Tom Poleman. Mr. Poleman expresses his opinions on terrestrial radio's reach impact on record sales. Mr. Poleman assumes that the internet simulcast of terrestrial broadcasts have exactly the same effect as terrestrial broadcast. (Poleman WDT, at ¶ 10.) Based on my knowledge of promotion to terrestrial radio and my knowledge of Internet radio, Mr. Poleman's speculation is unjustified.

5. Finally, I have reviewed the written direct testimony of John Dimick and Robert Francis Kocak ("Buzz Knight"). Mr. Dimick and Mr. Knight assert that, because record labels work to promote their music to terrestrial radio, then internet simulcasts of terrestrial performances *necessarily* must be at least as "promotional" as terrestrial radio is. (Dimick WDT, at ¶ 51; Knight WDT, at ¶¶ 27-31.) Again, I disagree. The nature of terrestrial radio, on the one hand, and Internet webcasting (simulcast and custom), on the other, are fundamentally different in terms of the potential promotional benefit to record labels and their artists.

I. Music Is Critically Important to the Success of Terrestrial Radio

6. The music played on terrestrial radio is the *content* not the advertising. Music is not "filler" or "free advertising" to record labels. Music is the content that the station provides and what its users want. A significant amount of airtime on terrestrial radio, particularly FM radio, is music. Terrestrial radio stations play our music because they believe it is responsive to consumer demand. Broadcasters collectively make billions of dollars a year from the advertising run on terrestrial radio.

7. If music offerings do not attract a sufficient audience, station programmers will not hesitate to switch to a different format and/or to abandon music altogether in favor of talk radio, news, or some other content that they think will attract listeners. But, station programmers have continued to play music and attract listeners. An overwhelming share of the success of

terrestrial radio—like simulcasting and webcasting services—is due to the contribution of artists and record labels that create the music that they play.

8. Terrestrial radio's free use of our content to drive its business is an anomaly. No other business enjoys a business model that allows for the performance of our full-length recordings to a mass public audience without paying for the right to do so. Music publishers are paid for the use of their copyrights on terrestrial radio in the U.S. I understand that outside the U.S., publishers and record companies both receive remuneration for the use of their works on terrestrial radio. I think that the anomalous situation in this country is unfair, but that is a matter for the Congress to address. In the meantime, we have made the best of a bad situation by trying to obtain some promotional benefit out of the free broadcast of our music. We promote our most promising new music to terrestrial radio stations because we know that a large audience listens to terrestrial radio stations to hear our music; because that type of exposure helps to stoke awareness and interest in the music; and because the nature of terrestrial offering means that listeners who like our music may be incentivized to pay for that music.

9. I agree with Mr. Poleman that when a station offers music, that music must "resonate with [] listeners," so they will keep "tuning into" those stations." (Poleman WDT, at ¶ 6.) Our promotion departments work with terrestrial radio programmers to expose them to new music that we think will resonate with their listeners.

10. Columbia puts painstaking time, energy and investment into its artists and sound recordings before they ever reach my desk. I help bring that great music to people's ears through terrestrial radio, but terrestrial radio is by no means the only way that listeners hear or discover

music.¹ Television, on-demand streaming services, and blogs, as well as other channels I described in Paragraph 1, drive new music discovery. Many Columbia releases have “broken”—i.e., have come to public attention—without significant radio airplay. Some recent examples include Beyoncé’s December 2013 release of *Beyoncé*, announced by her on Facebook and simultaneously made available for download through the iTunes Store; J. Cole’s promotion of his December 2014 release, *2014 Forest Hills Drive*, through Twitter and interviews with the press and others; the various *Glee* albums and individual tracks, for which the successful television show led to the sale of tens of millions of downloads; Barbara Streisand’s latest album *Partners*, driven in part by her appearance on the Jimmy Fallon Tonight Show; Tony Bennett *Duets 1*, due to, among other things, an NBC special featuring his music; and Jackie Evancho, after gaining attention as contestant on America’s Got Talent. *Beyoncé* and J.Cole received significant radio airplay *after* their releases, but otherwise none of these examples received significant radio airplay before or after release.

II. Non-Interactive Webcasting, including Simulcast and Custom Webcasting, on the One Hand, and Terrestrial Broadcasting, on the Other, are Fundamentally Different in Terms of Promoting Revenue-Generating Opportunities for Record Labels and their Artists

11. I understand that iHeartMedia and the National Association of Broadcasters contend that, because record labels devote resources to promoting new music to terrestrial radio, record labels *necessarily* believe that Internet simulcasts of terrestrial broadcasts have the same promotional benefits. I disagree.

¹ Notably, in promotion efforts, Columbia has used the number of streams a new track has on Spotify (in addition to other measures of potential) to convince terrestrial radio station programmers to play that new track or artist.

12. Terrestrial radio is fundamentally different than Internet simulcast. Hundreds of millions of people tune in to terrestrial radio every day.² Only a small fraction of that number listen to Internet simulcasts. Hence, there is no comparison between terrestrial broadcasts and internet simulcasts in terms of the size of the audience.

13. I know that some custom webcasting services—most notably, Pandora—have listener bases that significantly exceed those of internet simulcasts. Notwithstanding the size of the listener base, the promotional proposition of custom webcasting, like internet simulcasting, is fundamentally different than that from terrestrial radio. The same terrestrial radio broadcast reaches the entire audience tuned into the station at that time. In addition, there are a finite number of stations broadcasting music within listeners' geographic range.

14. Custom webcasting, on the other hand, allows users to create artist- or genre-specific stations that are “narrowcast” only to that individual. The services' computer algorithms will refine the music offered to the user, and the user can switch to other “stations” with different artist or genre specifications. As a result of these and other custom webcasting features, users can have much higher confidence that they will hear the music they want by remaining on the service, a lower likelihood of doing something to purchase music or pay for access to music than they would in the terrestrial radio environment.

15. Similar considerations to those I discuss in Paragraph 14 apply to simulcast services. A user of iHeart's online simulcast service, for example, can search the iHeart simulcast network by genre or geographic location; see a menu of simulcast (and other

² The Radio Advertising Bureau reports that 243,451,000 people (or 91.3% of all people over 12) tune in to radio each week. <http://www.rab.com/whyradio/Full_Fact_Sheet_v4.pdf>

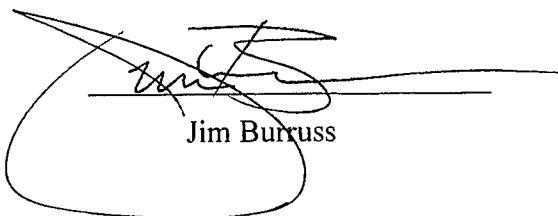
programmed) stations and the songs currently playing; and, pick among those songs currently playing the one he or she wants to hear. The user can also "search" for a particular artist and (if that artist is currently playing), among the options iHeart presents are simulcast stations currently playing a song by that artist. The user can switch to that station. Alternatively, the user can simply switch to iHeart's custom radio offering, and start (or resume) the cycle I described in Paragraph 14. In either case, the listener will be less likely to pay for music ownership or access than they would if the simulcast service did not exist.

16. Our radio promotion staff does not promote to streaming services, including simulcasters. We understand that our music will be played on those services. The size of the simulcast audience, however, does not justify independent promotional efforts. In the case of custom webcasting, in addition to considerations I have described above, computer algorithms, rather than program managers and editorial personnel, drive programming decisions. As a result, there is little that our promotion staff can do to expose the service to new artists or releases that may be of interest to the listening audience.

17. I understand that much of Sony's online marketing and promotion efforts are focusing on our on-demand partners, such as Spotify, Beats and others. That is not done within my department. I understand that Jennifer Fowler of Sony Music's sales division is discussing those efforts in more detail.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015



Jim Burruss

BACKGROUND

1. My name is Jennifer Fowler. I am Senior Vice President, U.S. Marketing and Revenue Generation, Sony Music Entertainment (“Sony Music”). I have held this position since June 2014. In this position, I am responsible for overseeing all marketing functions within the Sony Music U.S. Sales division. I have a diverse range of responsibilities that include retail and brand marketing, as well as insights and analytics. A critical component of my role is identifying opportunities to monetize our artists’ recorded music. Sony Music underwrites the development, production and marketing of that music by making substantial financial investments each year.

2. I have worked in the music business since starting my career in 1996. Prior to assuming my current position, I was Senior Vice President, Digital Marketing for RCA Records, one of the labels within Sony Music. In that position, I was responsible for RCA’s efforts to market its artists and releases through numerous digital platforms. Before joining RCA, I worked for eMusic, an independent online music retailer, where I was Director, Label & Artist Relations. I started my career in the music industry working for an independent promotion company.

REBUTTAL TESTIMONY

3. I have reviewed the public redacted versions of the written direct testimony submitted by Pandora’s Timothy Westergren and Simon Fleming-Wood. These witnesses assert that Pandora promotes record sales and other forms of revenue generation that benefit artists and their record labels. I understand that Pandora and other services point to this and similar testimony to argue that statutory webcasting services promote revenue-generation, while interactive, on-demand services substitute for revenue-generating opportunities. The statutory services thus implicitly argue that their content rates should not be set with reference to what on-

demand services pay. I disagree with the services' premise that they do not compete with on-demand services and that they should enjoy preferential rates because they—in purported contrast to on-demand services—provide promotional benefits. Pandora and other statutory webcasters are consumption platforms: they provide users with a destination to consume our product and are not significantly additive of other forms of revenues. Our directly licensed interactive-service partners—such as Spotify, Beats and others—also are consumption platforms. However, our directly licensed partners typically generate significantly higher average revenue per user (“ARPU”) returns than do statutory webcasters for the consumption of the same product. Our directly licensed partners also provide greater opportunities than statutory services do for increasing awareness of our artists and their music. The promotion by our directly licensed partners, in turn, generates more streaming consumption of our artists' content, and accordingly higher ARPU as more of our sound recordings are performed on directly licensed services.

I. In a World Rapidly Moving to an Access Model, Statutory Services Like Pandora Are Not “Promotional” of Revenue

4. Mr. Westergren and Mr. Fleming-Wood assert that, because Pandora plays music, and its users hear that music, the Judges should assume that Pandora has the power to drive other revenue opportunities. (Westergren WDT, at ¶¶ 36-38; Fleming-Wood WDT, at ¶¶ 28-30 [Mr. Fleming-Wood's ¶ 31, which is under the heading of “Pandora Promotional Programs for Artists and Labels,” is redacted entirely, and I have not reviewed any of it.])

5. The clear trend in the market is that listening to online streaming—a music access model—is rapidly replacing the purchase of CDs, digital downloads and the like—a music ownership model. In a world built on music access, streaming is not driving demand for product;

streaming is the product. And, in such a world, increasing ARPU is key to paying returns on the music that users consume.

6. Pandora and other statutory services that are ad-supported and free-to-the-listener do not generate high ARPU returns for the streaming consumption of a record company's core product. If anything, consumption of music on statutory services reduces users' interest in or desire for subscribing to higher-ARPU interactive services. I am not aware of any marketplace evidence showing that the use of statutory services promotes users to sign up for on-demand subscription services. In the music-access world, the substitution of statutory services for directly licensed subscription services undermines one of our most important sources of revenue generation.

7. Pandora seeks out the use of our artists' content for the programs Mr. Fleming-Wood describes at ¶¶ 29-30 of his written direct testimony. These programs primarily increase use of Pandora's service. Pandora users who like the music they hear through these Pandora programs are more likely to add a Pandora station playing these programs than listen to the artists through our directly licensed streaming partners or purchase the music. For example, Pandora recently sponsored a live concert with Jack White at Madison Square Garden and set up a Pandora station to stream this program. After the concert, Pandora [REDACTED]

[REDACTED] Pandora obviously believes that the promotional value to Pandora justifies the costs it incurs to sponsor these programs. Indeed, Mr. Fleming-Wood states that such "events are a beneficial marketing platform and overall value-add *for the service* [*i.e.*, Pandora]." (Fleming-Wood WDT, at ¶ 29, emphasis added.)

8. Likewise, Pandora from time to time has asked us to participate in a "Pandora Premieres" campaign. As we understand it, Pandora Premieres requires a record label to grant Pandora exclusive pre-release rights to perform the sound recordings, and also to waive the fee for such performances. Pandora campaigns do not encourage users to subscribe to higher ARPU offerings through our directly licensed partners. On the contrary, to the extent that users like the music they hear and want to create an artist station based on that music, the Premieres program is more likely to encourage users to create such stations on Pandora. This arrangement helps strengthen Pandora's brand and user loyalty to that service. (*See* Fleming-Wood WDT, at ¶ 30 ("Pandora itself receives significant benefits from Pandora Premieres").) We have not participated in the Pandora Premieres program.

9. We cannot promote our artists' releases through Pandora as we do on terrestrial radio or through our directly licensed streaming partners. Pandora does not program or editorialize music. Historically, we have understood that the algorithm dictates the frequency with which consumers are exposed to and made aware of our artists and their music. Pandora does not give record labels tools to "promote" their tracks across the Pandora platform. I am not aware of any strategic path to breaking songs or artists on Pandora.

10. I have overseen efforts to advertise on Pandora's service for RCA's artists. The results to date have not indicated that Pandora has a strong effect on music sales. For example, Exhibit 1 contains the results of an advertising campaign we conducted on Pandora for a Jennifer Hudson release. The campaign included over [REDACTED] ad impressions. However, the click-through rate from those ads to the iTunes Store (where users could purchase the track) was [REDACTED], a disappointing result. Pandora is never a material part of the standard marketing mix at any Sony Music label, particularly insofar as online advertising is concerned.

Our standard investments—where we’ve seen much more success driving revenue and conversion to paid services—are through search engine marketing (SEM – Google, Bing), social media (Facebook, YouTube, Twitter), and music recognition (Shazam).

11. Pandora also features a “buy button” in its user interface. A user may click the buy button to be taken to an online retailer to purchase the track they are listening to. Pandora has not provided us with, and I am not aware of, any data showing that this feature results in significant numbers of record sales.

II. Sony Music Labels Do Market and Promote Artists to *On-Demand* Streaming Services

12. The shift in the market toward access models has created a critical shift in the way our labels approach marketing and promotion. We now invest substantial resources and effort in marketing our releases and content to on-demand streaming services such as Spotify. This type of marketing has the potential to drive more consumption—and, accordingly, more revenue from higher ARPU services.

13. For example, our label sales representatives seek out strategic placement on partner homepages, social channels, in recommendation features and in marketing communications that highlight new releases. Exhibit 2 is an example of a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This type of editorial promotion is in stark contrast to Pandora, which does not utilize significant editorial features to promote artists. Moreover, the promotion of our artists through subscription

services encourages users to continue listening to those services, which in turn generates higher ARPU returns than if users listened to the same artist (or artist channels) on statutory services.

14. We also have created a playlisting service, Filtr, that programs playlists for promotion within the Spotify service and other directly licensed partners. Exhibit 3 contains examples of how Filtr playlist buttons appear in the Spotify user interface. These buttons feature images of our artists and encourage users to stream performances from the playlists. Filtr currently has over four million followers and has contributed to the success of artists like [REDACTED] as shown in Exhibit 4. Again, this encourages users to continue streaming performances through these higher ARPU services.

15. Our directly licensed partners offer a variety of other editorial features that garner exposure for our artists, including pairing artists with service-owned playlists to add a curation element to the playlist; and messaging through social media, with links to the artist's tracks on the service; and many others. Such editorial features increase awareness of our artists and generate high ARPU returns on performances of our artists' tracks. Anecdotally, Calvin Harris, a Sony Music artist illustrates the power of these features. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

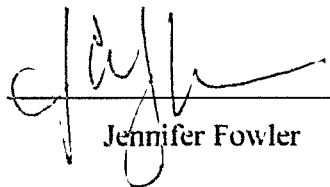
[REDACTED] (See Exhibit 5, at 8.)

16. To sum up, extensive promotional activities are taking place through our directly licensed partners. It simply is not the case, as the statutory services state, that they are today's radio, and interactive services are the record store. Music discovery and promotion are happening through interactive sites—with significantly better ARPU returns than on statutory

services—and that discovery and promotional activity will only increase during the next rate term.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015



Jennifer Fowler

Exhibits Sponsored By Jennifer Fowler

Exhibit No.	Sponsored By	Description
SX EX. 046 - RR	Jennifer Fowler	Ex. 1 – Results of Jennifer Hudson Pandora Advertising Campaign
SX EX. 047 - RR	Jennifer Fowler	Ex. 2 – [REDACTED]
SX EX. 048 - RP	Jennifer Fowler	Ex. 3 – Filtr Playlist
SX EX. 049 - RR	Jennifer Fowler	Ex. 4 – [REDACTED]
SX EX. 050 - RR	Jennifer Fowler	Ex. 5 – [REDACTED]

SX EX. 046 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 047 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

Q Search

Gossip – A Joyful...

Emerging Chart L...

The Drums – Porta...

Built To Spill – The...

Neutral Milk Hotel...

ANNIVERSARY

Amos Lee – As Th...

Heartless Bastards...

First Aid Kit - The L...

PARTY v.1

2NFrnm

Morning Glories

TOP OF THE CHA...

Cool Britannia by inf...

past tense by Peter...

Ladylike

Rolling Stone 100...

NME 100 tracks of...

Pitchfork's Top 10...

mike... by Peter Edge

The Ultimate... 86

Spotify Premium

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6,640 FOLLOWERS

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ULTIMATE WORKOUT

57,075 FOLLOWERS

Merv Garretson listened to

Disco 2000

Pulp

Merv Garretson listened to

Blister In The Sun (Remastered Album Version)

Violent Femmes

Bobby Sherman updated New Releases

Acetate

Metz

Bobby Sherman listened to

Living On The Ceiling

Blancmange

Bobby Sherman created the playlist

Love

Merv Garretson listened to

Legend

ake

+

0:00

4:02

IF YOU'RE
READING
THIS IT'S
TOO LATE

RESTRICTED – Subject to Protective Order in
Docket No. 14-CRB-001-WR (2016-20) (Web IV)

SX EX. 048-1-RP

SX EX. 049 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**

SX EX. 050 -RR

**RESTRICTED — Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)**